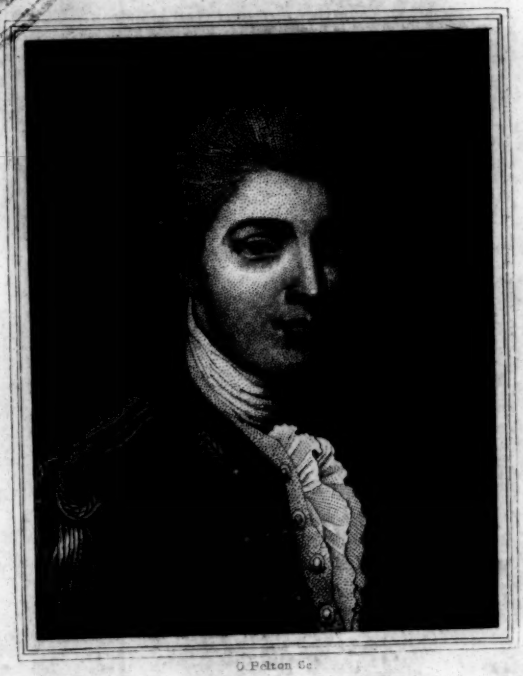
CRIMINAL TRIALS.

VOLUME II.

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AMERICAN

CRIMINAL TRIALS.

By PELEG W. CHANDLER,
MEMBER OF THE AMERICAN ANTIQUARIAN SOCIETY AND OF THE MASSACHUSETTS HISTORICAL SOCIETY.

VOLUME II.

BOSTON:
TIMOTHY H. CARTER AND COMPANY.
LONDON:
A. MAXWELL, 32 BELL YARD, LINCOLN'S INN.

MDCCCXLIV.

Entered according to the Act of Congress, in the year 1844,
By Peleg W. Chandler,
in the Clerk's Office of the District Court of the District of Massachusetts.

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BOSTON:
PRINTED BY FREEMAN AND BOLLES,
WASHINGTON STREET.

ADVERTISEMENT.

THE first volume of this work was published more than two years ago, and was stated to be an experiment, which, if successful, would demonstrate that the most important and interesting criminal trials, that have taken place in this country, might be rendered acceptable to the general reader, in the form of abridged narrations divested of the technicalities of legal proceedings. The favor with which the plan and objects of the work were received was highly encouraging, and the success of the first volume was at least equal to its merits. The present volume has been delayed by various causes, one of which was the difficulty of authenticating some of the facts, and it is believed, that the value of the work has been increased by the time consumed in the necessary investigations for this purpose.

These volumes extend over a period of more than one hundred and fifty years, and contain accounts of

the most interesting trials that have taken place, from the first establishment of judicial tribunals in this country, until after the adoption of the constitution of the United States. If they serve to illustrate the morals and manners, or the religious and political history of this period, and thus commend themselves to the American reader, the object of the author will be fully accomplished.

Boston, May, 1844.

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TRIAL OF BATHSHEBA SPOONER

AND OTHERS.

BEFORE THE

SUPERIOR COURT OF JUDICATURE,

FOR THE MURDER OF JOSHUA SPOONER, OF BROOKFIELD.

MASSACHUSETTS, 1778.

Of the trial of Bathsheba Spooner and others, at Worcester, Massachusetts, in 1778, no authentic report has ever been published. But the case produced great excitement, and was discussed in all the periodical publications of the time. There are also many traditionary accounts of the affair, most of which, however, are entitled to very little consideration, except as they furnish a clue to the real character of the transaction. In preparing the following account, I have diligently sought for information in every quarter where there was any reason to suppose it could be obtained; and nothing is stated for which there does not appear to be good authority. The sources of information upon which I have mainly relied are: — 1. The records of the Superior Court of Judicature, and those papers relating to the case which are preserved in the archives of the Commonwealth. 2. The Manuscript Notes of Hon. Jedediah Foster, one of the judges, who appears to have taken full minutes of the evidence. 3. The Manuscript Papers of the late Hon. Levi Lincoln, who was of counsel for the prisoners. 4. "A Sermon preached at Worcester, July 2, 1778, on occasion of the execution of James Buchanan, William Brooks, Ezra Ross, and Bathsheba Spooner, for the murder of Mr. Joshua Spooner, of Brookfield, on the evening of the first of March preceding; together with an appendix giving some account of these prisoners in their last stage. By Thadeus Maccarty, A.M., Pastor of the church in said Worcester." 5. A Sermon preached at Brookfield, March 6, 1778, on the day of the interment of Mr. Joshua Spooner. By Nathan Fiske, A. M., Pastor of the Third Church in Brookfield. 6. I have also carefully examined the newspapers of the period alluded to, and have sought for information from the few living persons who were personally cognizant of the facts in the case. My sincere acknowledgments are due to those gentlemen, who have kindly assisted me in these inquiries. I am under especial obligations to the late William Lincoln, Esq. of Worcester, whose antiquarian zeal was the least of his many excellent traits of character; to Samuel F. Haven, Esq., the librarian of the American Antiquarian Society; to the Rev. Joseph B. Felt, the librarian of the Massachusetts Historical Society, and to the Rev. Lucius R. Paige, of Cambridge.

TRIAL OF MRS. SPOONER AND OTHERS.

On the morning of March 2, 1778, a servant of Joshua Spooner, of Brookfield, in Massachusetts, came to Cooley's tavern, in that town, with an inquiry for his master, representing that he had not been at home during the night, and that his wife and family were greatly alarmed. This statement was received with much surprise at the inn, as Mr. Spooner had spent the previous evening there with some of his friends, and had left at an early hour for his own house, which was only at a short distance. A few of the neighbors immediately called on Mrs. Spooner, whom they found in the greatest apparent distress. Upon an examination of the premises, in the neighborhood of the house, they observed the tracks of several persons on the snow, and, on further search, the mangled body of Mr. Spooner was discovered in the well,[1] near his own door. On the next day, an

[1] The house in which Mr. Spooner had resided previous to the termination of his life by murder, is still standing (1843) unchanged, except

inquest being taken, it was found that the deceased, "on the evening of the first of March, about nine of the clock, being returning home from his neighbors, near his own door was feloniously assaulted by one or more ruffians, knocked down by a club, beat and bruised, and thrown into his own well with water in it, by persons to the jury unknown." The family of the deceased, with the exception of his little daughter, refused to look at the body, but his wife, at the urgent request of one of the jury, at length put her hand on his forehead, and exclaimed "*poor little man.*"

The report of this event spread very rapidly, and caused a great excitement in those troublous times, in the midst of the war.[1] That a peaceable citizen, in a remote town, should be waylaid and murdered so near his own house was a matter of serious alarm,

by the waste of years. It was a plain, but large and respectable dwelling, two stories in height and constructed after the fashion of those times, when comfort was consulted more than show in the economy of living. It is situated on the north side of the old road from Brookfield to Worcester, about half a mile eastward from the meeting-house of the South Parish, in the former town. In front, and nearly opposite, on the south side of the road, are stately elms. The buildings are unpainted, dilapidated, and falling to decay.

[1] The following statement appears in the Boston Independent Chronicle, newspaper, of March 12, 1778: — "On the night of the first instant a most horrid murder was committed at Brookfield, on the person of Mr. Joshua Spooner. From the long premeditation of this murder, the number of persons concerned (there being no less than seven capitally concerned) and the methods made use of to accomplish their designs, it is supposed to be the most extraordinary crime ever perpetrated in New England. Monday evening following, three of the villains concerned in the above murder, were taken up at Worcester. On examination they impeached their accomplices, in consequence of which Mrs. Spooner (the inventor of the murder) and the rest of her associates were seized, and on Tuesday evening carried to Worcester and confined in jail."

and most active measures were immediately taken to arrest the actors in this mysterious affair. It was known to some of the neighbors, that two men, who were formerly British soldiers, and were supposed to have deserted from Burgoyne's army, then at Cambridge, had been at Mr. Spooner's house on several occasions shortly before his death, and he had expressed a suspicion that their intentions were not entirely honest. One of these men, in a state of intoxication, having exhibited at Worcester some of Spooner's wearing apparel, they were both arrested, together with Ezra Ross, a young man of eighteen years, a native of Massachusetts, who had formerly served in the American army, and who was known to be intimate in the family of the deceased. From the statements of these men and the circumstances of the murder, there was a violent presumption that the family of Mr. Spooner could not be so ignorant of the manner of his death as they pretended to be; and Mrs. Spooner was also arrested, together with a female and two male servants, who were subsequently used as witnesses.

The matter had now assumed an importance, from the character and standing of the parties implicated in the transaction, which the atrocity of the murder could never have given to it. Mrs. Spooner was the daughter of Timothy Ruggles, a distinguished lawyer of that day, who had held some of the most honorable and important offices in the province, but who, at this time, on account of his political course, was under the ban of popular opinion, and had been obliged to leave the country.

Ruggles was graduated at Harvard college in 1732, and was soon afterwards called to the bar, where he rose to great distinction. In 1757, he was appointed a judge, and in 1762, chief justice of the court of common pleas, which office he held until the revolution. He was also distinguished as a military commander, having held the rank of colonel under Sir William Johnson, in the expedition against Crown Point. He was second in command at Lake George, where Baron Dieskau met with a signal defeat; and for three years, he was brigadier-general under Lord Amherst, with whom he served in the expedition against Canada. His political influence was very great, and he was several years a member of the provincial assembly, where he was chosen speaker of the house. In consequence of the difficulties with the mother country, delegates were chosen by the legislature to meet the delegates from the other colonies at New York, to seek out some possible relief from immediate and threatened evils, by a representation of their sufferings to the king and parliament. Ruggles was chosen one of the delegates on the part of Massachusetts, and had the honor of being selected as president of that celebrated congress, where were present some of the most distinguished men from eight of the other colonies. At this meeting, among other things, an address to the king was voted, and certain resolves were framed, setting forth the rights of the colonies, and claiming an entire exemption from all taxes, excepting those imposed by the local assemblies. Ruggles refused his concurrence in the proceedings; for which, on his return

home, he was censured by the house of representatives, and was reprimanded by the speaker in his place. Continuing firm in his allegiance to the king, he was compelled to leave the country, and all his large estates were confiscated.[1]

General Ruggles was a man of great ability, and few citizens of the province were more justly distinguished; none were more severely dealt with in the bitter controversies preceding the revolution. Like many others who joined the royal party, he was a true friend to his country, and was honest in his political opinions; but at the time of which we are now speaking he was regarded as the worst of traitors, and his name was held in the utmost abhorrence. That the daughter of such a man — and his favorite child — should be arrested on a charge of wilful murder, increased

[1] Gen Ruggles was born in Rochester, Mass., in 1711. He commenced the practice of the law in his native town, but subsequently removed to Sandwich. As his practice became very extensive he removed to Hardwick, in Worcester county, about the year 1755. He was a man of great wealth, and lived in a style of unusual luxury for that day. He kept thirty horses and had a park of twenty acres for deer, and a pack of hounds for the amusement of his numerous visiters. On the breaking out of the revolution he abandoned his extensive estates and left the country. He died in Wilmot, N. S., in 1795, at the age of 84 years. He had seven children, namely, *Martha*, who was born August 10, 1737, and married John Tufts, of Brookfield, in 1765; *Timothy*, born January 7, 1738-9, and died at Granville, N. S., in 1831; *Mary*, born February 10, 1740-1, married Dr. John Green, of Worcester, in 1762; *John*, born September 30, 1742, died at Wilmot, N. S., about 1830; *Richard*, born March 4, 1743-4, died at Clements, N. S., about 1834; *Bethsheba*, (sometimes written *Bathshua*) born February 13, 1745-6, married Joshua Spooner, of Brookfield, in 1766; *Elizabeth*, born May 15, 1748, married Gardner Chandler, of Hardwick.—Worcester Magazine, ii. 54; Washburn's Judicial History of Massachusetts, 226; Willard's Address to the Worcester Bar, 50; Records of the towns of Hardwick and Sandwich; MSS. letter of Rev. Lucius R. Paige.

the excitement, already very great, and gave rise to exaggerated and foolish reports, some of which have come down in tradition to the present day, and are told as sober truths in the region where this murder took place.

There are, however, many circumstances attending this case, which invest it with an unusual degree of interest, and render it one of the most remarkable in the annals of our criminal jurisprudence. Mrs. Spooner was the sixth child of General Ruggles. She was born on the 13th of February, 1745–6; and undoubtedly received all the advantages of education which were accessible at that day in the province. Tradition represents her as extremely prepossessing in her personal appearance, and she was noted for great strength of character; but her temper was haughty and imperious, and the circumstances of her birth and early education were not favorable to that delicacy and refinement, which constitute the greatest charm of the sex.

She was married in 1766, to Joshua Spooner, a retired trader, and had lived with him about twelve years.[1] The connection was not a happy one, and it was soon apparent, that there was no real affection between this husband and wife, who were in reality so ill suited to make a happy home. Mr. Spooner was in character a feeble man; and a woman of her marked and energetic nature, whose

[1] They had three children, one son and two daughters. The latter were subsequently married. It is supposed that the son was lost at sea, so that none of the name now remain.

passions had never been properly restrained,[1] would scarcely have a deep and trustful affection for a husband, who seemed incapable of supporting a manly importance as the head of his family, and who was incompetent to regulate the government of it in a manner to command respect. Domestic dissensions became frequent, and Mrs. Spooner soon conceived an utter aversion to her husband, until at length she seems to have cherished a criminal regard for another person, and, in the blindness of passion, lost all self-control.

Many months before the death of Mr. Spooner, a young man became an inmate of his house, under circumstances which were calculated to enlist the warmest sympathies of the family in his behalf. Ezra Ross, at that time a youth of sixteen, was the son of respectable parents in Ipswich, and with four brothers had joined the American army on the commencement of hostilities. On returning from his first campaign, he was cast upon the hospitalities of Mr. Spooner, from whose wife, during a severe fit of sickness, he experienced every kindness. After this he became a frequent and a welcome visiter in the family, and it is highly probable that an improper intimacy grew up between him and Mrs. Spooner, although her husband never seems to have lost his attachment for

[1] It is said that General Ruggles and his wife did not set a good example to their children in their conjugal relations. They lived unhappily together. When he left the country, she remained and died about the year 1785. She was originally a Bourne, and was the widow of a Newcomb, when she married General Ruggles. Tradition says that she once served up, for her husband's dinner, his favorite dog.

Ross.[1] But it is certain, that the subject of murdering Mr. Spooner was frequently discussed, and various projects to accomplish this purpose were suggested. Whether she was actuated by aversion to her husband, or was hurried on by the blind impulse of unchaste desire, it is now impossible to know, as she never made any revelations on the subject, and the statements of Ross are not worthy of entire confidence; but it seems probable that she was conscious that her conjugal infidelity must soon inevitably become known to her husband, and desired the death of one who must soon have indubitable evidence of her guilt. This accounts for the inconsistency of her conduct, and the desperate eagerness with which she undertook to accomplish her purpose. For, becoming dissatisfied with Ross's dilatory proceedings, she resorted to a course so bold and open, that her guilt was placed beyond a doubt, and she involved herself and her confederates in a common ruin.

Mrs. Spooner ordered a servant to call in any of the British soldiers who might pass the house; and about a month before the murder, and while Spooner and Ross were both absent, two men, James Buchanan and William Brooks, who had been British soldiers, were passing the house on the way to Springfield, when they were invited in by the servant, and

[1] The venerable Major Benjamin Russell, who then lived at Worcester, recollects to have seen Ross and Mrs. Spooner riding on horseback together, before the murder; he states that the former was a fine looking youth, and that the beauty of the latter, who was a remarkable horsewoman, has not been exaggerated in the least by traditionary accounts.

on the solicitation of Mrs. Spooner, they resided in the family two weeks, being treated with great consideration. There can be no doubt that Mrs. Spooner made a direct proposal to these entire strangers to murder her husband, which they agreed to do on the first favorable opportunity. When Spooner returned, he expressed a dissatisfaction at the presence of these men. He requested a neighbor to remain in the house with him during the night, and ordered Buchanan and Brooks to depart on the next morning. They remained concealed in the neighborhood, however, and were a part of the time supplied with food by Mrs. Spooner. On the night of the murder, Ross came to the house, either by accident or design, but which is not certain, although there is reason to doubt that he had ever seen Buchanan and Brooks before.

At the next term of the superior court of judicature, held at Worcester, on the third Tuesday of April, 1778, (being the twenty-first day of the month) the grand jury found a true bill against Buchanan, Brooks, Ross and Mrs. Spooner, for murder; and the trial took place at the same term of the court. The judges who presided were William Cushing,[1] chief

[1] Mr. Chief Justice Cushing was born in Scituate, in 1732. He was graduated at Harvard University in 1751, and upon being admitted to the bar he established himself in Pownalborough, in the district of Maine, and was the first regularly educated lawyer who settled in that state. In 1760, he was appointed the first judge of probate for the county of Lincoln, and, in 1772, succeeded his father as a judge of the superior court. In 1775 the superior court was reorganized, but he was restored to his place on the bench. John Adams was appointed chief justice, but never sat as a judge, and, the following year, he resigned his place on the bench. Cushing was then appointed his successor, and held the office till his promotion to the supreme court of the United States in 1789. In the mean time, he presided over the convention which assem-

justice, Jedediah Foster, Nathaniel Peaslee Sargeant, David Sewall, and James Sullivan, associate justices. The names of the jury were Ephraim May, Jonathan Phillips, Ebenezer Lovel, David Bigelow, Benjamin Stowell, Samuel Forbush, Joseph Harrington, John Phelps, Manasseh Sawyer, Elisha Goddard, Abraham Bacheler, and Mark Bacheler.

Robert Treat Paine was the attorney for the state. Levi Lincoln[1] was of the counsel assigned to the prisoners.

The indictment charged, that William Brooks, of Charlestown, laborer, James Buchanan, of the same Charlestown, laborer, and Ezra Ross, of Ipswich, laborer, on the first day of March, 1778, made an assault upon Joshua Spooner, of Brookfield; that Brooks struck the deceased down, and, with his hands and feet gave him several mortal bruises of which he in-

bled in Massachusetts in 1787, to act in regard to the adoption of the constitution of the United States. While Mr. Chief Justice Jay was absent in Europe, as envoy extraordinary, in negotiating the treaty with Great Britain, Mr. Cushing was the presiding judge of the United States court, and upon the resignation of Mr. Jay, he was nominated and unanimously confirmed as chief justice of that court. His ill health, however, compelled him to decline this appointment, and he continued to hold the place of an associate justice until 1810, the time of his death.

[1] He was born in Hingham, May 15, 1749, and was graduated at Harvard University in 1772. Upon being admitted to practise law, he established himself at Worcester, where he soon came into an extensive practice, and held various distinguished offices in the gift of the people. In 1797 he was a member of the senate of Massachusetts, and was afterwards chosen a member of the seventh congress. On the second day after taking his seat, he was appointed, by Mr. Jefferson, attorney general of the United States, which office he held four years. He was afterwards lieutenant-governor of Massachusetts, and in 1811 was appointed an associate justice of the supreme court of the United States, but he declined the appointment. He died in 1820, at the age of 71. Willard's Address, page 82.

stantly died, and that Buchanan and Ross were present, "aiding, assisting, abetting, comforting and maintaining the aforesaid Brooks." The indictment also charged, that Bathsheba Spooner was an accessory before the fact; that she "invited, moved, abetted, counselled and procured" the murder to be committed.

To this indictment the prisoners, on their arraignment, severally pleaded that they were not guilty, and put themselves for trial on God and the country. Their trial was accordingly fixed for the twenty-fourth of April, and took place in the meeting-house at Worcester. A large number of witnesses were in attendance on behalf of the prosecution, and, after the return of the jury of inquest was read, they testified substantially as follows:[1]

Jonathan King, a physician, testified that he spent Sunday evening with Mr. Spooner, at Cooley's tavern, about a quarter of a mile from Spooner's house; Spooner went home well between eight and nine of the clock. On the next morning, hearing that Mr. Spooner was dead, the witness rode there with all speed, and saw the body of the deceased, which had been taken from the well. He found the face, above his nose, and his temple very much bruised; the scalp was cut an inch and a half long. The body was carried into the east room; Mrs. Spooner could not be persuaded to look at it, and the family, except his little daughter, declined

[1] The testimony of the witnesses in this case is derived from the notes of Judge Foster. It is not well reported, some portions being very obscure, but I have thought it best to make only slight alterations.

going to see it. After the jury had finished their inquest, Mrs. Spooner, at the particular desire of the witness, went to the body and put her hand on his forehead and said, "*poor little man.*" There was blood on the curb of the well.

Ephraim Cooley testified, that Mr. Spooner was at his house on Sunday evening; he was pleasant and sociable, and went away when Dr. King and his wife went away — was well. The next morning Alexander Cumings, one of the family, came and inquired if Mr. Spooner was there. The witness being anxious, from some apprehensions, for Spooner's safety, went to his house and six more with him; they asked if Mr. Spooner was at home. Mrs. Spooner said *no*, and cried. The witness went to look among the neighbors, and near the gate he found the snow in a heap, and kicking it found Spooner's hat, which he carried in and said, "this is Mr. Spooner's hat, what do you think now?" Mrs. Spooner said, "it is his hat." After he had got about thirty rods, they called him back; the body was in the well. He saw blood on the curb in two spots; he went immediately for the coroner and officer. The witness came down with Mrs. Spooner to Worcester, and at Brown's, in Worcester, she spoke freely of the matter, and said she was the whole means of this murder being committed. She began the discourse herself, and wept when she talked about it.

Ephraim Curtiss, having heard that the prisoners were at Walker's, went there and found them on Monday evening. He stood at the door until they were taken; they were carried to Mr. Brown's to be

examined. A few days after Buchanan was committed he found a ring, which was in court, in his possession; he had a wound on his arm.

Joshua Whitney, on the second of March, was at Brown's when Mr. Curtiss came in, and said he heard Mr. Spooner was murdered, and three fellows were at Walker's who were suspected; he went there and found them. Brooks had a watch in his pocket, and a pair of silver buckles in his shoes; the witness asked where the other fellow was; and went into an upper loft, where he found Ross, who trembled and appeared to be surprised. When he came down Buchanan was gone; he saw Brooks turn round to the negro girl, who showed him the watch, and said Brooks gave it to her. The watch was in court. Brooks had a pair of buckles in his shoes with the initial letters of Mr. Spooner's name. Upon the watch being shown to him he owned it was the same watch which he had in his pocket. The witness watched to keep the prisoners. Ross said he wished he could see a minister, for he was really guilty of this crime, but he did not strike the first blow, although he was aiding and assisting; they were then talking about the killing of Mr. Spooner — said he would confess the whole when the minister came. Ross said he had got Spooner's jacket and breeches; that he had let Brooks have his because they were bloody. The witness found in his pocket-book four ten pound notes and three eight dollar bills; he said the rest was his own; he also said he had Spooner's hose, shirt and saddlebags.

Joseph Ball, on the second of March, in the even-

ing, went to Walker's and found Brooks. Capt. Whitney ordered him to lead him down to Mr. Brown's, and when they were there Ross was committed to his care. He had on a pair of black knit breeches and a cloth jacket with metal buttons. The horse that was there was one that the witness had seen Spooner and his wife ride formerly. He had seen Buchanan at Walker's some weeks before; he was a blacksmith. He heard Ross say he labored under a good deal of concern; he wished a minister was sent for.

Samuel Bridge went to Mr. Brown's, from thence to Walker's, and when they came back to Brown's, Doctor Green's son said the buckles were his uncle Spooner's. The jacket Ross had on was of brown cloth with yellow metal buttons. He talked with Mrs. Spooner when she came down, and heard her say if she could see the persons face to face she could give satisfaction; said this was the effects of bad company. She had been in Worcester the Friday and Saturday next preceding the time of her being brought.

Mary Walker, on Thursday evening, saw Brooks and Buchanan at her mother's, and after they had been there a little while Mrs. Spooner and a young man came to the door, when Mrs. Spooner asked if Sergeant Buchanan was there, and gave him a letter which she said came from her grenadier. The contents of the letter were, that he would meet him to go to the hill. She came back from Doctor Green's very soon, saying that she forgot to give him a piece of cloth which was his. She said she would knit for the witness, because she could not sew for want of

sight. She staid there two hours. Buchanan and Brooks were there all the time, and they staid there until Sunday forenoon. Mrs. Spooner was often with them. Sergeant Buchanan wrote sundry letters which he said were to her servant. Brooks often laid his head upon Mrs. Spooner's neck, and oftentimes put his hands round her waist. The witness observing it, Mrs. Spooner said, "you must not wonder, Billy (meaning Brooks) has lived at my house and is as fond of me as he would be of a mother." The witness saw Buchanan divide powder into eighteen papers; they had talked about a sick child at Brookfield. She asked Buchanan when he would go; she said she would send a letter by him, and then said she would write a letter at Mr. Nazro's, it would not be any hurt to write to her father. Buchanan was very sorry that Mrs. Spooner did not come. On Saturday afternoon she came, and they having been in the chamber together a few minutes, she went away on the same afternoon. Upon her going away, Mrs. Spooner said, "to-morrow night at eleven o'clock, remember, sergeant." He said, "to-morrow night at eleven o'clock." On the next Sunday night, Brooks, Buchanan and Ross came back, and in the morning early, they told her the Springfield guard were in pursuit of them, and Brookfield was searched in every house. Mrs. Spooner met them at Leicester and told them of it. The witness asked Ross if he had ever seen Mrs. Spooner, and he said he did not know as he had; but he had seen Mr. Spooner, and rode to Lancaster with him. Ross seemed to be very dull all Sunday. The witness asked him what made him so

dull? He walked about the room and leaned against the side of the house and said, "Reason enough." Sergeant Buchanan desired her to rip off the ruffles from a shirt, and she ripped the ruffles off of the sleeves. Brooks told her that Mrs. Spooner gave him a shirt and pair of stockings. Buchanan bled himself on Monday morning.

Prudence, a negro woman, testified, that Buchanan came to Mrs. Walker's with Brooks on Thursday, and talked about going to Mrs. Jones's. Mrs. Spooner came there and soon went away and soon after came back again with Dr. Green's two sons. She staid all the evening, and was often in and out. Mrs. Spooner told John Green he had better go and see if his mother was at home. Sergeant Buchanan offered her his handkerchief. She said "G—d d—m the handkerchief, I will not touch it." On Friday morning, Buchanan had some powders which he did up in papers. Mrs. Spooner came in, Brooks told her Buchanan was sick, and she went into the chamber to him. The witness went up there after a broom, and saw them together. On Saturday, as Mrs. Spooner was going away, the witness asked her what Mrs. Green said; she said she told Mrs. Green she dined at Mr. Nazro's and drank tea there, and it was a pretty good lie. On Sunday, Brooks and Buchanan went away, but on Sunday night they came back, and said they should have been taken if it had not been for a friend. Their dress was altered. She asked what became of Brooks's silk; they answered they sold it for want of money; they met with Ross two miles from Leicester tavern.

Thomas Green testified, that the buckles were Mr. Spooner's; they were marked J. S. He had seen them in his uncle's shoes.

Charles Simson testified that he altered the jacket for Spooner, which Brooks had on.

John Hibbard testified, that he lived with Mr. Spooner, and had seen Ross, Buchanan and Brooks there above a week before Mr. Spooner was murdered.

Reuben Olds had frequently been at Mr. Spooner's the winter past, and about a fortnight before the murder, Buchanan and Brooks were there one evening. Mr. Spooner desired the witness to tarry with him that night. He did tarry there, and Spooner bade him go out and see what they were doing in the kitchen. He went out and Buchanan said, "what is the old fellow about? (meaning Spooner) he will not come to say much to me, it won't be healthy for him, for I would put him in the well for two coppers." The next morning Mrs. Spooner told him she would go through with her plan; he supposed it was to go to her father.

Loved Lincoln, about the first of February, was at Spooner's, who wanted to know when he went to Oakham. He and Spooner and Ross set out, and he went with them as far as Chadwick's, in Oakham. On the following Tuesday he went to Spooner to see if he had done some business for him, and then he saw Brooks and Buchanan there. Afterwards he was there and somebody looked into the window, and presently he heard Sergeant Buchanan speak. Spooner says, "how came you here?" They said to warm

them. Spooner replied, "you may sit by my fire till morning, but you must not let me see you afterwards." Soon after the witness heard Buchanan say, "if Spooner turns me out of doors to-night, I will have his life before morning." The night after the murder, Mrs. Spooner said she did not know how her husband came by his death. She said the regulars went away the day before yesterday, and that Ross took Spooner's jacket and breeches. Mrs. Spooner said Ross was concealed there because he hurt the horse's back. She said the regulars and Ross went away together.

Charles, Captain Welden's negro, was at Mr. Spooner's the night he was murdered, and saw Ross there; it was about the dusk of evening.

Mrs. Willson, about three weeks before the murder, was at Mr. Spooner's. Buchanan and Brooks were there, and a doctor was there. Alexander Cumings was whispering with Mrs. Spooner. She saw Ross there a little before Thanksgiving, the last autumn.

Alexander Cumings had lived with Spooner from the time Burgoyne's troops came down. About a fortnight before the murder, Brooks and Buchanan came there. Spooner was gone. Mrs. Spooner was at home; they staid all day and dined there, and Buchanan breakfasted with her. Mrs. Spooner had ordered him to call in all the British troops who passed along. The witness heard Mrs. Spooner tell Buchanan that she wished Mr. Spooner was out of the way; she could not live with him. Buchanan said he wished he was out of the way. They staid there, backwards and forwards, all the time Mr.

Spooner was gone to Princeton. Ross had gone with Spooner. When Spooner came home, on Monday night, Brooks and Buchanan were there. The witness heard Brooks and Buchanan say, they would try to get Spooner out of the way. He sat up with Spooner at his request, who said he did not love to have Brooks in the house; he did not like the looks of the man. He desired his wife to get them off; he said if she did not he would send for the committee. Next morning the witness saw them in the barn; they lay there two days and two nights. Mrs. Spooner carried them victuals once; he carried them victuals once by her order. On Thursday morning they went to Worcester. On the Saturday night following Mrs. Spooner came home, and Ross was in the milk-room. Ross said he did not want Mr. Spooner to know he was there all day. On Sunday Ross was kept concealed in the chamber. On Sunday night the witness saw Buchanan and Brooks there. Mr. Spooner was then gone to Cooley's. The witness went out of doors and saw Brooks, who asked if that was Mrs. Spooner; he said *no*, and Brooks then told him to ask Mrs. Spooner to come out to him. The witness refused. Brooks had told him, just before, that Spooner should not come home a living man that night. The witness went in and Mrs. Spooner was in the kitchen; he then went to bed and slept about two hours and a half. He waked and smelt the burning of woollen, and got up, and saw Brooks, Buchanan, Ross, and Mrs. Spooner in the parlor. They were burning clothes; they asked him what made him look so sullen; they were then

shifting clothes. Ross put on Mr. Spooner's jacket and breeches. Mrs. Spooner bade the witness go with Mrs. Stratten into the chamber to bring down Mr. Spooner's clothes. Mrs. Stratten got the black breeches and brought them. Buchanan had on a shirt of Mr. Spooner's; he heard Mrs. Spooner say she gave Brooks a shirt and handkerchief; he saw Brooks's breeches thrown into the fire all bloody. He saw Mrs. Spooner take Mr. Spooner's money from the tin box, which was kept in a mahogany chest. Mrs. Spooner bade him go and get some water to wash Spooner's buckles, and he should have them; he said he would not have them, but he and Mrs. Stratten went to the well and could not dip the bucket. Mrs. Spooner asked him why he did not get the water, he said he believed Mr. Spooner was in the well; she said it was not true. Mrs. Stratten came in with him, frighted and cried, and run and got the Bible. Buchanan said to Mrs. Spooner, "should you've thought my man would do the job for him?" Mrs. Spooner, about a month before, had desired the witness to kill Spooner and she would make a man of him. He asked Mrs. Spooner if they cut Mr. Spooner's throat; she said, "no, they knocked him down." The night before they went to Princeton, Ross dropped some aquafortis into some toddy to poison him. Spooner said if he had any enemies in the house he should think they intended to poison him. Ross said to Mrs. Spooner, when he came, that he had no opportunity to give him the aquafortis while they were gone. Mrs. Spooner said he carried half a bottle full. When

they went away, after the murder, Buchanan shook hands with Mrs. Spooner, and told her she might expect to see him in about a fortnight. On the next morning, Mrs. Spooner went to the well, and said she hoped he was in heaven. She ordered the witness to get a horse, and go to the tavern and inquire for Spooner. While they were at the well, she said she wanted to have him put in the bottom of the well.

Asa Bigelow testified, that the foreman of the jury of inquest told Mrs. Spooner she must go to jail. She confessed that she hired the people to concert the murder; was to give them one thousand dollars, and had paid them two hundred. She mentioned the names of Brooks and the sergeant; she said they were all three together.

Sarah Stratten lived at Mr. Spooner's at several times. The first time she saw Ross there was in the last fall of the year, between the two Thanksgivings. Spooner came from Boston after they were in bed; Mrs. Spooner got up and let him in. About three weeks before Spooner was killed, Buchanan and Brooks were there, and the night he was murdered one Gray and another man lodged there. She carried some supper into the room where Ross and Buchanan were. Mrs. Spooner supped with Mr. Gray and his partner. The witness did not see Mr. Spooner killed, but when she went to light Mr. Gray to bed, she saw Mrs. Spooner showing a money box. She took the witness by the hand, and said she hoped Mr. Spooner was in heaven. When she went to light Gray to bed, his partner was in bed and asleep, as it appeared to her. She brought down the box,

and soon after Mrs. Spooner asked her to go up chamber, and get a pair of black knit breeches, but she could not find them. Mrs. Spooner was paying some money, and Buchanan had a great deal of paper money in his hand. She heard Mrs. Spooner tell Alexander to go and get some water, and he asked the witness to go out with him. She went out and Alek (Alexander) said Mr. Spooner was in the well. They came in without any water. She had seen Mr. Spooner wear a ring very much like the one in court. She lodged a part of the night with Mrs. Spooner, who sighed and tumbled a good deal. She told Mrs. Spooner she would go and tell the neighbors. Mrs. Spooner said if she would keep it secret, she would give her a good deal. Mrs. Spooner often said she hoped Mr. Spooner was in heaven. When the men went away, Mrs. Spooner gave them money. The witness asked Brooks what he had been about; he made answer, "*his* time is come." The Saturday night before Spooner was murdered, Ross came in; said he had Mr. Spooner's horse a fortnight, and hurt his back, and was not willing he should see him. Mrs. Spooner came in soon after Ross came.

Jesse Parker had lived at Mr. Spooner's at times; he had seen Buchanan and Brooks there in the barn. About a fortnight before Mr. Spooner was killed they lay there two or three nights. Mrs. Spooner, Alek and he carried victuals to them. Mrs. Spooner told him to go to the barn to look at the horses and take care of the doors, but he did not, because the regulars were about. When Mr. Spooner came from

Princeton, Mrs. Spooner said she never was so stumped in her life. The witness heard Mrs. Spooner say she had been to the west parish, and the regulars were gone to Worcester, and she wanted to go there to see her sister. She asked Mr. Spooner for a horse, but he declined letting her have one, and she sent to Capt. Welden's and got his. The witness went from the house on the Sunday, and Ross was there.

Obadiah Rice, sometime before the murder, heard Mrs. Spooner say she wished old Bogus was in heaven. When Mrs. Spooner, Alek, and Mrs. Stratten were brought to jail they came in his sleigh, and when they were on the road Mrs. Spooner said, "this don't seem like Christmas day." She said she had a great desire to see her Daddy, and if it had not been for that this murder would never have been committed. He heard Mrs. Spooner say she would suffer ten deaths for Mrs. Stratten and Alek before they should suffer, for they were innocent.

Elisha Hamilton was the constable. Mrs. Spooner took on much and said, "if it was not for this thing I could meet my Judge." She said, "this happened by means of Ross's being sick at our house." She told Cooley that she did not blame any body, for this was all her own doings. She said Mrs. Stratten and Alek were innocent. She had bribed them to do and say what they had done.

William Young, a justice of the peace, before whom the prisoners were examined on their first arrest, produced the confessions of Brooks, Buchanan and Ross, which were freely given to him by these

prisoners. He testified that Mrs. Spooner, since her commitment, had confessed that she consented to the murder. The confessions of the three men were in substance, that the murder was committed by them at the instigation of Mrs. Spooner. When her husband was entering his yard on the evening of the murder, he was attacked and immediately killed, and thrown into the well. The four persons then met in the house, when Mrs. Spooner distributed among her confederates a portion of her husband's wearing apparel and a considerable sum of money. The men immediately left the house, and were arrested as before stated.

Such, in substance, was the testimony against the prisoners. No evidence appears to have been offered in their behalf, and their counsel proceeded to sum up in the defence, under a pressure of circumstances that might well have discouraged the most zealous advocate. Mr. Lincoln's argument was as able and ingenious, perhaps, as could have been expected in such a case; it was necessarily based, in a great degree, upon purely technical points. A brief and imperfect abstract of his address to the jury is all that can now be collected.

He commenced by alluding, in a feeling manner, to the importance and novelty of the case. It was the first capital trial since the establishment of the government. Perhaps a more important or difficult case had never been committed to an American jury. The public mind was intensely excited; but he begged of the jury to banish all feeling and prejudice — all indignation at the enormity of the offence — all opin-

ions from hearsay — all political feelings.[1] By the great principles of the law the prisoners were innocent until proved to be guilty.

Murder was where a person of sound memory and discretion unlawfully kills a reasonable creature in the peace of government, with malice aforethought, either express or implied. An accessory before the fact was he who, being absent at the time, doth yet procure, counsel, and commend the crime. For if present, aiding, and one only doth the act, they are all principals. In order, therefore, to determine whether the prisoners had been guilty of the crimes *charged in the indictment*, the jury must keep in their minds the evidence against each one separate and distinct. It was necessary that they be convinced that each one was designedly instrumental in the death, which fact must be proved in such a manner as to leave not even a shadow of doubt in their minds.

Now the fact of killing was not denied; that it was murder, in *somebody*, was confessed. But it did not follow that A, B and C were the murderers, which must be proved beyond all doubt before the jury could convict them; for the jury could not infer from the murder itself, *which* did the act, when it might be one of them. *One* must have done it. Could not all the facts have taken place as testified, and yet A not be concerned to that degree which this indictment supposed? If the proof was of a less degree of guilt than the indictment supposed, then in respect to this indictment, it was no proof at all.

[1] This, doubtless, was in allusion to the violent prejudice at this time in Massachusetts against Mrs. Spooner's father, on account of his political course.

It was not his business to defend either of the prisoners against the imputation of guilt; all had been wicked; all had been guilty in a degree. He could not deny; he believed he might safely admit, that A was privy to, and concealed the death of the deceased, and, perhaps, consented to it, or did not try to prevent it, and was guilty of misprision of felony — and yet firmly stand upon the only ground which it behooved him to maintain. *Principal* or *accessory* was the gist of the inquiry, and the proof of nothing else was to the purpose. Everything that was proved respecting Ross was perfectly innocent in reference to the crime charged in the indictment. He was sure the circumstances, taken altogether, did not afford proof presumptive, probability, or even suspicion of there being a design in Ross to hurt Mr. Spooner.

Was there anything in the nature of things that Ross, doing so and so, necessarily implied the existence of all those circumstances that constitute murder? Was not innocency, in the sense of the indictment, perfectly consistent with the facts proved? And it was a rule, that no man's guilt could be proved by any evidence that was compatible with his innocence.

The proof of a crime might be divided into two classes, perfect and imperfect. Those were perfect which excluded the possibility of innocence. Imperfect, those which did not exclude this possibility. Of the first, one only was sufficient for condemnation; of the second, as many were required as form a perfect proof; that is, if each, taken separately, did not exclude this possibility, yet if they did by their union, it was perfect proof, which was always requisite;

but separate, independent proofs, which did not connect in time, so as at last to connect with the fact to be proved, did not amount to perfect proof.

The confession of a criminal could rarely be turned against him, without obviating the end for which he must be supposed to have given it. It was uncertain; there had been instances of murder avowed that had not been committed, and confession of goods stolen that were never out of the possession of the owner.[1] It was unjust and dangerous to suffer confessions, dictated by the distraction of fear, or the misdirected hopes of mercy, to have much weight. Besides, the evidence of words ought to be received with great caution and distrust, which were spoken in unsuspicious confidence, or in the hurry and perturbation of a mind anxious and pressed by leading questions. The words might be very innocent when spoken, and criminal when related; much depended upon the time and concomitant circumstances.

The learned counsel then proceeded to a more full discussion of the law of principal and accessory, contending that the testimony was not sufficient to convict Ross of the offence charged in the indictment, although he might be guilty of misprision of felony and proceeded against as such. The mere fact of his being present was not sufficient. The jury must be satisfied, beyond all doubt, that he was present with a

[1] The most remarkable case of this sort occurred since this trial. It was the case of the Boorns, two brothers, in Vermont, who, upon being charged with the murder of one Colvin, who had suddenly disappeared in 1813, made a full and circumstantial confession, and were condemned to death. But the man, supposed to have been murdered, appeared before the day fixed for the execution. Law Reporter, V. 193.

design to assist. Now if Ross had a design against Spooner's life, he had previously had frequent opportunities to take it — at his house — at Princeton — on the road — by poison. The matter had been long in agitation, and his neglecting various opportunities to accomplish it, showed that he had no real design to do it, but only wished to keep up the appearance of an intention.

In regard to Mrs. Spooner, the main argument of Mr. Lincoln was, that she was not in a sound mind. The whole evidence was that of a fool or a distracted person. Born in a high rank of life — well educated and accomplished — a wife and a mother, and in the enjoyment of a good estate, what object could she have in undertaking such a detestable crime? What end could it serve? Were there any reasons persuading, hopes inviting, or advantages arising from the death of her husband? By it she would deprive her children of their father and guardian — herself of a husband, and would subject herself to the burthens of her family with only one third of the estate instead of the whole of it. Could she, then, have seriously projected this matter, with a design of having it executed? and if she did, could she have been in the exercise of her reason? If it was said she could not live with her husband, could she not have separated, and gone to her father, whose favorite she was — to her brother and her other friends? There, with her address, and engaging appearance, she might have had any gallant she pleased, not such as Ross, but one more fitted to her rank and station in life.

It was a well known principle, founded in nature,

that the source of wickedness, the incentive to guilt, was the hope of impunity. But what hopes of being undetected, what presumption of impunity could she have? Was it possible to conceal the matter, considering the number of persons engaged, their character, their situation, and their profession, no plan formed to conceal it, no story agreed on, no place to flee to — the matter entrusted to strangers, with no evidence of their fidelity? She is seen in company with them the night before, at Walker's — procures calomel — agrees on the time — reminds them of it before company, "*at eleven o'clock.*" Why the calomel, if her husband was to be assassinated? She previously tells that Mr. Spooner is going a long journey, and inquires if any body wants to hire his farm. After the murder, she gives the murderers his watch, buckles, waistcoat, breeches and shirts, and even puts them on, to be worn in the eye of the world, where they were well known to be Spooner's clothes, and from their goodness and fashion might be known not to belong to the persons wearing them, being low and vulgar. Was this the conduct of a person in the exercise of reason? Would it have been less rational to have written on their foreheads, in capitals, "*the murderers of Mr. Spooner!*"

If, then, the conduct was irrational, if it was what could not be directed by a person in the exercise of reason, there was the best evidence of a disordered mind that the nature of the thing would admit of. For there was no knowing the state of the mind, but by a person's conduct. The distraction, the disorders of the mind operate variously — mark the differ-

ence between a fool and a man disordered — the fool draws wrong conclusions from right principles — the disordered mind argues right from wrong principles.

As to confessions, they were not evidence any further than, from the nature of the thing and circumstances, they could be supposed to be true. If the confession of one was taken as conclusive evidence of the truth, then another's might be, which was different and inconsistent; but if the first was taken for true, then a confession was admitted as evidence of truth, which was necessarily untrue. Besides, a person confessing his own turpitude, was not to be regarded against others, and why against himself, seeing it could not be believed, on the veracity of the witness, for if that was the foundation of belief, it was as good against another person as himself. If the ground was, because it was against his interest, then if any reason could be assigned for his doing it, besides its being true, it could be no evidence of truth. Then, why should he not make a wrong confession, as well as a true one? a man that has murdered could not feel an obligation to speak the truth.

Was it credible, that it should ever enter into the head of a person of so much capacity and so much cunning, to entrust an affair so heinously criminal to strangers, deserters and foreigners, who, had they escaped detection here, would probably have boasted of their feats, after they got off to the enemy; and if she was afraid they would not disclose it, to entrust it with other women and boys? Must she not have had some motive, some proper means, some plan fixed, some chosen trusty confidant, or some reason to hope

either to accomplish or conceal so detestable an action before she would have engaged in it, if she had been in her senses? It was perpetrated in the heart of a populous town, near neighbors where it must at farthest be discovered by the morning — liable to be heard in the time of it — by the people abroad, by the two travellers who lodged there that night, by the children, and others of the family.

Was it possible she would commit so atrocious a crime, and run so great a hazard from no motive? It was said she was upon ill terms with her husband. This was to trump up one crime, that there may seem to have been a motive to have perpetrated another from. But to whom did she commit the execution of it? Whom did she make use of as her accomplices? whom as her confidant? Whom did she trust with the management of a villany, that so nearly affected her reputation, her safety, her life, her children, the lives of others, and the happiness of her friends? The answer was, to prostitutes, tories, regulars, deserters, strangers and foreigners. Was a woman that is admitted to have sense, so stupid, if in the exercise of her reason, as to trust all that was valuable to her and hers, in the hands of such persons? Could there be a doubt, in the minds of the jury, that this woman was not in a state of mind which rendered her guilty in the eye of the law, of a most horrible crime, which would subject her to the last infliction of human power and vengeance?

Such is a condensed statement of Mr. Lincoln's argument, as gathered from his manuscript notes of the trial. Some portions of it were ingenious, and

the whole was as able and consistent as could have reasonably been expected under the circumstances of such a case. But it did not serve to raise any real doubts as to the guilt of all the prisoners, and it required but little effort, on the part of the attorney for the state, to expose the fallacy of the technical points, in their application to the facts as proved.

The jury returned a verdict of guilty of murder, and sentence of death was pronounced on the four prisoners by the chief justice. The trial occupied sixteen hours. During the whole of it Mrs. Spooner manifested perfect composure and appeared to be utterly indifferent as to the result. Her demeanor was proud and reserved, and she submitted to her fate without a murmur.

The time appointed by the council of the state for the execution of the prisoners was Thursday, the fourth day of the ensuing June. Meanwhile they were confined in the jail at Worcester. The three men seemed entirely broken down by their fate. They acknowledged the justice of their sentence, and, under the teachings of their spiritual adviser, they gave themselves to prayer, and "became mighty in the scriptures, and were wont to make very pertinent observations upon many passages that were mentioned to them." They made a full and particular confession[1] of their guilt, which is here inserted.

"On February 8th, 1778, we, James Buchanan and William Brooks left Worcester with an intent to go

[1] "The dying declaration of James Buchanan, Ezra Ross, and William Brooks, who were executed at Worcester, July 2, 1778, for the murder of Mr. Joshua Spooner."

to Springfield to work. In passing Mr. Spooner's we were called in by Alexander Cumings, who we thought was a British soldier. Having stood some time by the fire, he told us his master was gone from home, but he would go and call his mistress, for she had a great regard for the army, as her father was in it and one of her brothers. He called her, and she came down, and appeared glad to see us. She asked us whether we came from the Hill? We told her we did, and were going to Canada, as I, Buchanan, had left my family there. She ordered breakfast for us, and as soon as it was ready we were desired to go into the sitting-room. We were very much surprised at this, for we should have thought ourselves well dealt by to have received any favors she might see fit to bestow on us in the kitchen. However, we all breakfasted together. The weather being very bad, we were asked to stay till it cleared up. As we had but little money, we accordingly stayed. The weather continuing very bad, we stayed there that day and night. I (Buchanan) am not positive whether it was the first or second day, she told me, when by ourselves, that she and her husband did not agree — that he was gone a journey to Princeton, and that he would not be home soon — that we should not go from thence until the weather was fair, there being a great fall of snow at this time.

"We very readily consented, and stayed from day to day, expecting Mr. Spooner home. Mrs. Spooner getting very free in discourse with me, (Buchanan) one day told me that she never expected Mr. Spooner to return, as there was one Mr. Ross gone with him,

who had an ounce of poison, which he had promised her he would give to Mr. Spooner the first convenient opportunity.

"The reader must needs think this a very strange circumstance, that she should make such a discovery to an entire stranger. She said at the same time, we should stay till we saw whether Mr. Spooner returned or not. Accordingly we stayed, and were never in better quarters, little thinking of the bait the seducer of souls was laying for us; we were then in a disposition to catch at it, having no fear of God before our eyes, and being entirely forsaken of him.

"Having tarried ten or eleven days, as nearly as can be recollected, her husband came home, and seeing us there, asked her who we were. She told him that I (Buchanan) was cousin to Alexander Cumings. He took no further notice of it, but going out among his neighbors, it is likely he was informed how long we had been there, and probably heard, at the tavern, of the quantity of liquor he had to pay for, since his going on his journey. Be that as it may, at night he came home, and seeing we were not gone, he desired us to go immediately. We begged he would let us stay till morning. He after some time consented that we should stay by the fire all night. He was in the sitting-room by himself, and Mrs. Spooner went to bed. There was one Reuben Old came upon some business with Mr. Spooner, and after some time came out and told us that Mr. Spooner told him he was afraid we should rob him, adding that he had lost a silver spoon, and a great deal of pewter. This vexed us, as we were conscious we had no thought of steal-

ing from him. Had we been so inclined, we had as much opportunity as we could have desired. The spoon he found where he laid it, and Cumings convinced him there was none of the pewter missing.

"Mr. Spooner went up stairs and brought down a box, which he had his money in, and lay down on the floor with it under his head. Everything Mr. Spooner did or said, Old came and told us, and was with us all the time he was asleep, and we were all merry together, sitting by the kitchen fire. Said Old declared in court, that I, Buchanan, said if Mr. Spooner came out, I would, for two coppers, put him into the well, which is false. In the morning, it not being convenient to see Mrs. Spooner, to take our leave of her, we, Buchanan, Brooks and Cumings went to Mrs. Stratten's to pass the day, till we could get an opportunity to bid Mrs. Spooner farewell. We stayed at Mrs. Stratten's the best part of the day. Cumings having received five dollars from Mr. Spooner, to treat his pretended cousin with, we went to Mr. Cooley's tavern and had some drink, from thence to doctor Foxcroft's, stayed there until Cumings came and told us Mr. Spooner was in bed. We then went to the house, and had supper and liquor, retired to the barn and tarried all night. In the morning had breakfast sent to the barn for us. And as Mrs. Berry and Mrs. Tufts had been there the day before and wanted to see me, (Buchanan) I said I would go and see them. Mrs. Spooner said she would also go, which was agreed on. Buchanan and Brooks went there, and we all stayed at Mr. Green's, drinking until late; some distance from

thence, she said she had given a handkerchief to a British soldier that had some words in anger with me, Buchanan, upon which Brooks went back on the horse, and she and I went home. Brooks missed his road on his return, but got to the house some time after us; but he did not get the handkerchief, as the soldier would not deliver it, until he saw Mrs. Spooner. Buchanan and Brooks stayed that night in the barn; in the morning went to Mr. Gilbert's tavern and stayed there some time, and on coming out from his house we saw Cumings approaching on one of Mr. Spooner's horses; he told us his master was gone to the tavern, and that his mistress desired we would come there, which we did, and had supper; we went to the barn that night, and in the morning she sent us word that her husband was gone abroad into the country to get some oats.

"The boy Parker had proposed to Brooks, if he would come and meet Mr. Spooner and himself, on their return, the said Parker said he would help to take Mr. Spooner's life. We went over from the barn to the house, and found he was gone, and stayed there all day, and lived on the best the house afforded of meat and drink.

"Mr. Spooner came home in the dusk of the evening, so that we had like to have been seen; but we heard him come with the sleigh to the door and Brooks ran into the cellar, and I went and stood on the back stairs, until he went into the sitting-room. We then came out, and went to the barn, there stayed all next day, and at night when Mr. Spooner was in bed, we were sent for to the house and

received supper and some liquor to encourage another plan, which Cumings and Parker (who have for this time escaped punishment,) proposed to poor Brooks, which was, they all three to go up stairs, and Brooks to take his life from him; for which he was to receive one thousand dollars, Mr. Spooner's watch, buckles, and as much cloth as would make a suit of clothes; but Brooks's heart failed him; and Mrs. Spooner said she did not think he was so faint-hearted. Had this been done he was to be put into the well as he was taken out of bed; for she observed it would be thought he had fallen in, while drawing water in the night; next day we had breakfast brought us by Cumings. He informed us there was another plan formed by her, which was as follows. Either Cumings or Parker were to tell Mr. Spooner one of the horses was sick; and, as he came to the barn, to kill him, and put him amongst the horses' feet, to make people believe, when he was found, that the horses had killed him. But Brooks told Parker not to tell him, but to make her believe he would not go over. The boy conducted accordingly. We stayed all that day and night. The next day being Sunday, we stayed there; she came over at night; we told her we should go away the next morning; she desired we would not; but we would not stay. We set out to go to Springfield; as we went through Western on that road, we engaged to work with one Mr. Marks, a smith; I, Buchanan, worked there two days; but as he had no files fit for the branch of trade Brooks followed, we proposed to go to Worcester to get home, which was agreed to.

"We set off on Wednesday about noon, and in going by Mr. Spooner's we called and told her where we were going; she said she would follow us down the next day, as she wanted to see her sister, saying she was glad we had got work so near; and further added, that she had got two notes, one of twenty pounds, lawful, and another of three hundred dollars, which she would endeavor to get changed, and let me, Buchanan, have one hundred dollars, to purchase anything I might want.

"We stayed in the barn till morning, and then set out for Worcester, and she followed us the same day and called at Mrs. Walker's for us, according to agreement; she came in and stayed some time, and gave me, Buchanan, a note, as much cloth as made a shirt, and six or seven dollars, observing that they came from one M'Donald, an acquaintance of hers; she then went to see her sister, and desired us to stay till she came back, which we did; she returned on Friday morning about ten o'clock, and stayed till night; she told me, Buchanan, at parting, that she had no more paper money, but what she had given me; but begged I would procure her some poison to give Mr. Spooner. I accordingly that day got one drachm of calomel, and made it into twenty papers. I desired her to give one in the morning; she told me she never gave him any; she went to her sister's late that night and called on us in the morning, about ten o'clock. I went to the door; she would not come in, but desired me to come up to Mr. Nazro's shop, and she would get files for us, as we had not money sufficient to get what we wanted; she asked me,

when we would come through Brookfield. I told her if she would sit up, we would call on Monday night, at eleven o'clock; she said she would. I parted with her and sent Brooks up to the shop. But as he came in sight he saw her ride from the door, and therefore did not go there; we stayed at Walker's until Sunday afternoon, and then left Worcester, and about eight o'clock at night got to Mr. Spooner's; we saw Mrs. Stratten at the well. Buchanan spoke to her; she told me there was company in the house, but she would let Mrs. Spooner know we were there. Mrs. Spooner came out, and told us that one Mr. Ross was in the house, who had a brace of pistols loaded, and that he had promised her he would kill Mr. Spooner as he came home from the tavern. She desired us to come in, which we did; he showed us a pistol, and said Mr. Spooner should die by that to-night. Either Brooks or Buchanan said it would alarm the neighbors.

"Brooks said if Ross would help him he would knock him down; accordingly it was agreed on, and there was a look-out kept at the sitting-room door for his coming. In the mean time there was some supper brought by Mrs. Stratten to us; we had had some flip before, and there was now some rum brought, which we drank, each of us by turns giving a look out. We are certain Mrs. Stratten could not but know what was going forward. That we leave the public to judge of. Mr. Spooner was at length seen coming, and then was the time for the Devil to show his power over them who had forsaken God.

"William Brooks went out and stood within the

small gate leading into the kitchen, and as Mr. Spooner came past him he knocked him down with his hand. He strove to speak when down. Brooks took him by the throat and partly strangled him. Ross and Buchanan came out; Ross took Mr. Spooner's watch out and gave it to Buchanan; Brooks and Ross took him up and put him into the well head first; before they carried him away, I, Buchanan, pulled off his shoes: I was instantly struck with horror of conscience, as well I might. I went into the house and met Mrs. Spooner in the sitting-room; she seemed vastly confused: she immediately went up and brought the money which was in a box. She not having the key, desired me to break it open, which I did; at the same time Brooks and Ross came in: she gave two notes of four hundred dollars each to Ross to change and give the money to Brooks; but there was found some paper money, which Brooks received (two hundred and forty-three dollars) and the notes were returned. At the same time she gave Ross four notes, each of them ten pounds, to purchase camlet for a riding dress. Ross gave Brooks his waistcoat, breeches and a shirt. She went and brought Ross a waistcoat, breeches and shirt of Mr. Spooner's. When they were shifted she gave me, Buchanan, three eight dollar bills, and asked me when she should see me again; I told her in fourteen days; but it pleased God to order it sooner, and in a dreadful situation. Had we all been immediately struck dead, after the perpetration of so horrid a murder, and sent to hell, God would have been justified and we justly condemned.

"About 11 o'clock at night, we set off for Worcester. About 4 o'clock in the morning we reached Mrs. Walker's house; Mary Walker and a negro girl were within; we told them a parcel of lies to excuse our sudden return; in the morning we went to drinking, to endeavor to drown the thoughts of the horrid action we had been guilty of. We stayed there all day with a view to go off at night, but it pleased God to order it otherwise; for Brooks, being in liquor, went down to Mr. Brown's tavern; there showing Mr. Spooner's watch, and the people seeing him have silver buckles, became suspicious of him, and one Ensign Clark going to Mrs. Walker's and seeing what passed there, gave information concerning us. The news of the murder had now reached the town, and we were all taken, and brought before the committee, and examined, and committed to jail. On the 24th of April last we were brought to trial before the superior court, found guilty and received sentence of death."

Of the three men, Ross seems to have been the best educated and the least hardened, and altogether of the most interesting character. The inducements to the crime on the part of Buchanan and Brooks were principally the promise of a pecuniary compensation. They deliberately and in cold blood planned the murder of one, who was an entire stranger to them, and from whose death they could only hope for gold as a reward. Moreover, they had arrived at years of maturity. Buchanan, who was a Scotchman, and had been a sergeant in Burgoyne's army, was thirty years old, and a man of decent education and

good appearance. Brooks, an Englishman, had been a private in the same army, and was twenty-seven years old. On the other hand, Ross was a mere boy. He was of respectable parentage, and had been well educated. He was also prepossessing in his personal appearance, and having been cast upon the hospitality of Mr. Spooner under peculiar circumstances, he received many acts of kindness from Mrs. Spooner, between whom and himself there grew up an improper, but very warm attachment. Having a strong aversion to her own husband, it is not strange that she was able to gain an influence over the mind of the youth whom she had tenderly nursed in illness, and to whom she held out most tempting allurements to crime. It is evident, however, that Ross hesitated long as to the murder; and there was no positive testimony, that he knew of Mrs. Spooner's arrangements with Buchanan and Brooks, or that he had entered into their deliberations before the fatal night when he met them, apparently by accident, at the house, and where he became a party to the crime.

Upon the aged parents of Ross, the news of his conviction fell with a crushing weight. In the state archives of Massachusetts, there is a touching petition, which they presented for the life of the son, who was so dear to them in their old age.

"The memorial and petition of Jabez Ross, and Joanna Ross, of Ipswich, in the county of Essex, humbly sheweth, That your memorialists are the unhappy parents of a most unfortunate son, now under

sentence of death for the murder of Mr. Spooner — a murder the most shocking in its kind and in circumstances not to be paralleled — That out of the public troubles of the day your memorialists have been called by providence to suffer a large and uncommon share — That at the commencement of hostilities, of seventeen children, six sons and three daughters alone survived to your aged and distressed petitioners, whose footsteps from that period have been marked with anxiety, and whose sorrows, from the melancholy fate of their youngest son, have received a tinge of the keenest kind.

"At the first instance of bloodshed, five of the six sons entered the public service; four fought on Bunker Hill, three marched to the southward with General Washington, of which number was the unhappy convict, who engaged for one, the other two for three years. A fourth mingled at the northward his bones with the dust of the earth.

"On his return from the first year's campaign, he was, by the lot of providence, cast upon Mrs. Spooner, in a severe fit for [of] sickness, from whom he received every kind office and mark of tenderness, that could endear and make grateful a child of sixteen, sick, destitute, in a strange place, at a distance from friend or acquaintance. After the evacuation of Ticonderoga, in his march to reinforce the northern army, gratitude for past favors led him to call on his old benefactress, who then added to the number of her kindnesses, and engaged a visit on his return. With a mind thus prepared and thus irresistibly prepossessed, by her addresses, kindnesses on his tender

years, he for the first time heard the horrid proposals; tempted by promises flattering to his situation, and seduced both from virtue and prudence, a child as he was, by a lewd, artful woman, he but too readily acceded to her measures, black as they were. But never attempted an execution of the detestable crime, notwithstanding repeated solicitations, and as frequent opportunities, until on an accidental meeting, he became a party with those ruffians, who, without his privity, had fixed on the time and place for that horrid transaction, of which he now stands justly convicted.

"Your petitioners by no means attempt an extenuation of guilt, or measures inconsistent with the safety of the community and the preservation of individuals. But if it is consistent, if the criminal, who is thoroughly impressed with a sense of what is past, present, or to come, can be spared, and his guilt condemned; if he has been a valuable member of society, and fought in her cause, although from the inexperience peculiar to youth, the strength of some momentary impulses, and alluring seducements, he gradually erred until he arrived to the violent act of wickedness; if upon recollection he has found repentance, confesses his life a forfeiture to the law, looking up to heaven for that forgiveness which none can find on earth; if an early confession of the whole matter, and the suffering of a thousand deaths in the reflections of the mind; if the law, the government, and the grave can be satisfied and mercy displayed — in fine, if youth, if old age, the sorrows, the anguish of a father, the yearning of a mother, the

compassion and wishes of thousands can avail; — if any or all of these considerations can arrest the hand of justice, plead effectually for mercy, and induce your honors to extend that pardon towards one of the four unhappy victims destined to a most awful execution, and thereby give him an opportunity of atoning to the public for the injury he has done it — restore him to his country, to himself, his sympathizing friends, to his aged, drooping and distressed parents; — it will console them under the weightiest afflictions, and turn the wormwood and the gall into something tolerable; and your petitioners in duty bound will ever pray."

George Leslie, the minister of the church in Linebrook, to which these aged people belonged, joined their petition in a modest and feeling request that their prayer might be granted, if not inconsistent with public justice. But the supreme authority of the state saw no reason for making any exception in favor of Ross, and he was left for execution. He conducted with great propriety after his fate was decided upon, and was publicly baptized. The day of his execution was kept as a season of fasting and prayer for his untimely end, in his native parish.[1]

But the object of the greatest interest in this unhappy affair, was the wretched woman, who must be held responsible, in a great degree, for all the misery it occasioned. After the trial, she was often visited by Mr. Maccarty, the aged minister of Worcester, and with him she conversed freely upon her situation;

[1] Felt's History of Ipswich, 117.

but would not admit the justice of her sentence. She insisted that the witnesses had wronged her, and declared that although she had planned the matter, yet that she never thought it would be executed; that she relented when she found they were in earnest. She exhibited uncommon fortitude in her trying situation, or rather she seemed hardened and destitute of all feeling, "being far less affected by many circumstances in her case, than those around her." She refused, by word or deed, to ask or accept the sympathy of others, and, being conscious of the intense prejudice and excitement against her, she determined that her appearance should be marked by no weakness, or womanly infirmity. She occasionally remarked, to her spiritual adviser, however, that she felt more than she could express. And there was one point on which she exhibited all that anxiety and feeling which is only known to the female breast. She declared that she was soon to become a mother.

A petition for a respite of all the criminals was immediately sent to the council, to which Mr. Maccarty added his own desire, that it might be successful, in order that they might be the better prepared for the solemn scene before them. "And as to the unhappy woman he would beg leave further to represent, that she declares she is several months advanced in her pregnancy, for which reason she humbly desires that her execution may be respited, till she shall have brought forth." To which Mrs. Spooner added; "the above application is made at my most earnest request."

The council ordered the executions to be stayed

one month,[1] and the sheriff was ordered to take the steps pointed out by the law to ascertain whether the statement of Mrs. Spooner was true. Accordingly a jury, consisting of two men-midwives and twelve matrons was summoned in, and made the necessary examination. They returned a verdict that the prisoner was not quick with child. On being informed of this result, she immediately petitioned to the council in the following terms.

"May it please your honors: with unfeigned gratitude I acknowledge the favor you lately granted me, of a reprieve. I must beg leave, once more, humbly to lie at your feet, and to represent to you, that though the jury of matrons, that were appointed to examine into my case, have not brought in in my favor, yet that I am absolutely certain of being in a pregnant state, and above four months advanced in it; and that the infant I bear was lawfully begotten. I am earnestly desirous of being spared, till I shall be delivered of it. I must humbly desire your honors, notwithstanding my great unworthiness, to take my deplorable case into your compassionate consideration. What I bear, and clearly perceive to be animated, is innocent of the faults of her who bears it, and has, I beg leave to say, a right to the existence which God hath begun to give it. Your honors' humane *christian* principles, I am very certain, must lead

[1] "Last week the Honorable Council granted a reprieve to the prisoners, under sentence of death in this place, for four weeks; their execution will be on the 2d July. The prisoners complain much of the multitudes that crowd in upon them. They therefore desire that none may come to see them out of a vain curiosity, but leave them to enjoy their short time in as profitable a manner as may be." Worcester Spy of June 2, 1778.

you to desire to preserve life, even in this its miniature state, rather than to destroy it. Suffer me, therefore, with all earnestness, to beseech your honors to grant me such a further length of time, at least, as that there may be the fairest and fullest opportunity to have the matter fully ascertained — and as in duty bound, shall, during my short continuance, pray."

The council having refused to grant this petition, a strong effort was made to induce them to change their purpose. Mr. Maccarty sought a reprieve with great earnestness, expressing a firm belief that the jury of matrons were mistaken. The two men-midwives who were on the jury, and one of the matrons joined in a written statement with Dr. Green, the brother-in-law of Mrs. Spooner, that they now believed she was quick with child. But two other matrons, who were of the jury, certified, that on a second examination, their opinion was unchanged.[1] The council, in this conflict of opinion, were inflexible, and the prisoner was left for execution at the appointed time. She received the announcement with great calmness; but insisted upon the truth of her statement, and requested that her body might be examined after her death.

On the morning of the second of July, 1778, the town of Worcester was filled by an immense throng of people, many of whom had come a great distance,

[1] A copy of the warrant to the sheriff to summon in a jury, and his return, with the other papers on this point, may be found in the Appendix at the end of this volume. The originals are in the state archives of Massachusetts.

to witness the execution of these criminals.[1] Meanwhile, the intense excitement of the crowd without was in striking contrast with the apparent calmness of the woman who was to suffer an ignominious death. Mrs. Spooner appeared more quiet than usual on this eventful day; but she seemed more humble and penitent, and professed her faith in the Saviour of the world, and her dependence upon him. A few moments before she left the cell she was baptized. According to the custom of that day, a sermon was preached in the presence of the prisoners, before the execution, by Rev. Thaddeus Maccarty, from Deuteronomy, xix. 13. "Thine eye shall not pity him, but

[1] The following advertisements in the Worcester Spy, of that period, give some idea of the excitement on the subject, and are curious on many accounts.

"The selectmen of the town of Worcester, taking into their consideration the large concourse of people that will probably attend at the execution of the unhappy persons under sentence of death here, as also that there are several hospitals, in this county, for the reception of persons having the small pox, do, in behalf of the public, caution and request all physicians and nurses, concerned in such hospitals, and persons having lately had the small pox, not to appear in the assembly of spectators, unless sufficiently cleansed. Otherwise their attendance may prove fatal to many, and render the execution, which is intended for the warning and benefit of all, a public detriment.

By order of the selectmen,

WILLIAM STEARNS, *Town Clerk.*

Worcester, June 24, 1778.

WORCESTER, JULY 2, 1778.

"This day was published, price two shillings, The Dying Declaration of James Buchanan, William Brooks, Ezra Ross, who are to be executed this day for the murder of Mr. Joshua Spooner, late of Brookfield."

"Also, this day published, a Poem on James Buchanan, Ezra Ross, and William Brooks, who are to be executed at Worcester, this day, being Thursday, July 2, together with Bathsheba Spooner, for the barbarous murder of her husband, Mr. Joshua Spooner, late of Brookfield. Sold at the printing office, in Worcester, and by I. Thomas, in Londonderry."

thou shalt put away the guilt of innocent blood from Israel, that it may go well with thee." Mrs. Spooner, "through great bodily infirmity, was not able to attend the public exercise on that day."

It was about half past two of the clock, in the afternoon, when the four criminals were brought out of prison and conducted to the place of execution, under a guard of one hundred men. The three soldiers went on foot. Mrs. Spooner was carried in a chaise, being then, as she had been for several days, exceedingly feeble. The procession was regular and solemn. Just before they reached the place of execution one of the most terrific thunder storms that had occurred within the memory of the oldest inhabitants, darkened the heavens. "There followed an awful half hour. The loud shouts of the officers, amidst a crowd of five thousand people, to '*make way, make way!*' the horses pressing upon those in front; the shrieks of women in the tumult and confusion; the malefactors slowly advancing to the fatal tree, preceded by the dismal coffins; the fierce coruscations of lightning athwart the darkened horizon, quickly followed by loud peals of thunder, conspired together and produced a dreadful scene of horror. It seemed as if the Author of nature had added such terrors to the punishment of the criminals as might soften the stoutest hearts of the most obdurate and abandoned."

At length, the place of execution having been reached, Ross, Buchanan and Brooks, ascended the stage, when the death-warrant was read to them. The former made an audible prayer; the other two

were engaged in private devotions till they were turned off. Mrs. Spooner, on account of her feeble health, was suffered to remain in the chaise in which she had been conveyed, until the last moment. She was frequently seen to bow gracefully to many of the spectators with whom she had been acquainted. "When called to ascend the stage, with a gentle smile, she stepped out of the carriage and crept up the ladder on her hands and knees." When the faces of the malefactors were covered and all was ready, Mrs. Spooner acknowledged, for the first time, that her punishment was just. She took the sheriff by the hand and said, "*my dear sir, I am ready. In a little time I expect to be in bliss; and but a few years must elapse when I hope I shall see you and my other friends again.*"

On the evening of the same day the body of the wretched woman was examined by surgeons, as she had requested, and a perfect male fœtus, of the growth of five months, was taken from her. It was thus discovered, but too late, that a great and humane principle, to be found in the laws of all civilized nations, had been violated in her death. The effect of this discovery on the public mind can scarcely be adequately described. The excitement against Mrs. Spooner, from the nature of the crime which she had committed, had been naturally increased by the prejudice against her family, and especially by her apparent indifference to her fate and her open contempt for public opinion. She made no request for life. She constantly refused to beg for mercy for herself, and her statement that she was about to

become a mother, was generally regarded as the trick of an artful woman to postpone the day of her suffering. But when she had paid the full penalty of the law and the startling truth was whispered to the retiring multitude, that her statement was true, and that the vengeance of the law had fallen on her unborn child, there was a universal feeling of regret at the haste of the proceedings. Every mother, who had seen her die, shuddered at the recollection; and what must have been the feelings of that "jury of discreet matrons" — mothers as they were — to whom had been committed the charge of ascertaining the truth, and who, through prejudice, or ignorance, or malice, had been the occasion of this grievous mistake!

The terror, which her punishment was intended to produce, was neutralized by pity for her sufferings. Her appearance was so calm, and her end so peaceful, that it was forgotten how deeply her hands were stained with blood. The tragedy was long recited around the hearths of those who saw her die, and the obdurate wickedness of the heroine was almost disregarded in the admiration excited for her beauty, her energy, and her fortitude.

But to those familiar with criminal jurisprudence, the case furnishes only an additional illustration, that the most revolting crimes, of which we have any account, have been committed by the fair hand of woman. And the effect of criminal indulgence on the female mind is the more remarkable, as we do not expect to find her a criminal at all. When woman oversteps the modesty of her position and breaks loose from

the restraints of the laws — her whole character is changed — her affections are inverted — she is turned to stone.

> Women are soft, mild, pitiful, and flexible;
> Thou, stern, obdurate, flinty, rough, remorseless.

Accordingly, it will be found, that no criminals are so hardened, none go through the ordeal of a public trial, or endure a death of shame with more calmness and apparent innocence than women.

With thinking men of that day, it was doubtless a matter of deep regret, that there should have been any circumstances attending the death of Mrs. Spooner, which should divert the public attention from the enormity of her crime. The trial itself seems to have been properly conducted, and the justice of the verdict no one can presume to doubt. But the subsequent proceedings were of a most extraordinary character. By the humane principles of the common law, where a woman is capitally convicted, and pleads her pregnancy, there must be a respite of execution. This is a mercy dictated by the law of nature, *in favorem prolis;* and therefore, says the learned commentator on the laws of England, no part of the bloody proceedings in the reign of Queen Mary, hath been more justly detested, than the cruelty that was exercised in the island of Guernsey, of burning a woman big with child; and when, through the violence of the flames, the infant sprang forth at the stake, and was preserved by the by-standers, after some deliberation of the priests who assisted at the sacrifice, they cast it into the fire as a young

heretic; a barbarity which they never learned from the laws of *ancient* Rome, which direct, with the same humanity as our own, *quod prægnantis mulieris damnatæ pœna differatur, quoad pariat*, which doctrine has also prevailed in England, as early as the first memorials of our law will reach. In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women, to inquire the fact: and if they bring in their verdict, *quick with child*, (for barely *with child*, unless it be alive in the womb, is not sufficient) execution shall be staid till the next session; and so from session to session, till either she is delivered, or proves, by the course of nature, not to have been with child at all.[1]

Mrs. Spooner did not plead her pregnancy in stay of execution; but after sentence was passed she prayed for a respite. Whereupon a warrant was sent from the executive council of the state to the sheriff to summon in a jury of matrons, and make the proper examination. Their verdict, as time soon demonstated, was erroneous; and under the circumstances of doubt with which the case was enveloped, the refusal of the council to grant a reprieve was certainly most extraordinary. A letter addressed to them by the Rev. Mr. Maccarty, places the matter in its true

[1] Blackstone's Commentaries on the Laws of England, iv. 394. See also 3 Inst. 17; 2 Curw. Hawk. 657; 1 Hale, P. C. 368; 2 Hale, P. C. 413. The latest case upon this subject is that of Regina *v.* Wycherly, in England, (8 Carrington and Payne's Reports, 262). In that case the jury of matrons found a verdict that the prisoner was not quick with child, but before the time appointed for her execution, she was respited, in order that it might be ascertained with certainty whether she was quick with child or not.

light. "The news arrived last evening to Mrs. Spooner," wrote this venerable clergyman to the council, a few days before the execution, "that her petition for a reprieve was not granted. People that are acquainted with her circumstances, are exceedingly affected with it. I am myself fully satisfied of her being in a pregnant state, and have been so for a considerable time, and it is with deep regret that I think of her being cut off, till she shall have brought forth, which will eventually, though not intentionally, destroy innocent life. An experienced midwife, belonging here, visited her this week, and examined her, and found her quick with child. Wherefore, though I think justice ought to take place upon her as well as the rest, yet I must beg leave earnestly to desire that she might be respited, at least for such a time as that the matter may be fully cleared up. And I have no doubt it will be so satisfactorily to every one. I write this, may it please your honors, of my own accord, not at her desire, for I have not seen her since the news arrived. I should be very sorry if your honors should consider me as over officious in the matter. But principles of humanity, and a desire that righteousness may go forth as brightness, and judgment at the noon-day, have powerfully prompted me to make this application on her behalf."

The whole subject is of a most distressing character, and at this day, when all the facts cannot be known, the only apology for these proceedings must be sought in the excitement of the public mind upon this subject, and the unsettled condition of the state governments during the war of the revolution. For,

in any view of the case, it is surely a stigma upon the criminal jurisprudence of Massachusetts, that the execution of Mrs. Spooner was not respited until the birth of her child. Even now, after the lapse of half a century, no one can read the story of this wretched woman, without a shudder at the fate of that mother, who made an ineffectual prayer for the life of the innocent one whose existence was so intimately and sacredly connected with her own; and who, instead of submitting to her fate with so much calmness and fortitude, might well have exclaimed, —

> Murderers!
> They that stabb'd Cæsar, shed no blood at all,
> Did not offend, nor were not worthy blame,
> If this foul deed were by to equal it.
> He was a man; this, in respect, a child;
> And men ne'er spend their fury on a child.

TRIAL OF COLONEL DAVID HENLEY,

BEFORE A

GENERAL COURT MARTIAL,

FOR IMPROPER CONDUCT AS AN OFFICER OF THE AMERICAN ARMY.

CAMBRIDGE, MASSACHUSETTS, 1778.

The trial of Colonel Henley, at Cambridge, Massachusetts, in 1778, was published in that year, under the following title: "The proceedings of a General Court Martial, held at Cambridge on Tuesday the twentieth of January; and continued, by several adjournments, to Wednesday, the 25th of February, 1778, upon the trial of Colonel David Henley. Boston: printed by J. Gill, in Court Street, 1778." An edition of the trial was also printed in England, which I have never seen, but which is stated in the Collections of the Massachusetts Historical Society, viii. 296, (second series) to have been "much garbled." An account of this trial is also given in a rare work, entitled, "Travels through the Interior Parts of America; in a series of Letters. By an Officer. London. 1789." The author of this work was Thomas Anburey, an officer in General Burgoyne's army. It is written in a bitter spirit, and many of the statements are not entitled to credit, although the work is not deficient in ability. Anburey seems to have been present at the trial, and gives a more complete report of General Burgoyne's address to the court than can be found elsewhere. Moreover, his report was undoubtedly corrected by General Burgoyne, before its publication; and I have not hesitated to adopt it. In addition to these works, I have consulted the standard historical works of that period, especially the Memoirs of General Heath, and the papers in the Collections of the Massachusetts Historical Society. I have also derived assistance from an interesting discourse on the imprisonment of Burgoyne's army, by Ivers J. Austin, Esq., who examined the manuscript papers left by General Heath.

TRIAL OF COLONEL HENLEY.

One of the most important schemes of the British government, in the early part of the revolutionary struggle, was that of opening a way to New York by means of an army, which should descend from the lakes to the banks of the Hudson, and unite, in the vicinity of Albany, with that commanded by General Howe. The junction of the two armies, it was confidently believed, would shortly bring about the total subjection of America. All measures, which were deemed essential to the success of so important an enterprise, were accordingly taken. The entire direction of the operations was confided to General Burgoyne, an officer of uncontested ability, possessed of an exact knowledge of the country, and animated by an ardent thirst for military glory. He displayed extreme activity in completing the preparations which might conduce to the success of the enterprise;

and, in a short time, collected in Canada, a grand army of many thousand men in the best possible condition, and accompanied by a formidable train of artillery. No means were neglected to ensure the success of the expedition; and the detestable course was resorted to, of employing the savages in this unnatural war: a measure which merited, as it received, the execration of all good men in every part of the world. The preparations being at length completed, General Burgoyne issued his memorable and infamous proclamation — unworthy the general of a civilized nation — in which he magnified the force of the British armies and fleets, which were about to embrace and crush every part of America; and warned the contumacious, that justice and vengeance, accompanied with devastation, famine, and all the calamities in their train, were about to overtake them.

This proclamation was issued on the twenty-ninth of June, 1777; on the seventeenth of October, in the same year, the grand army and its general surrendered themselves prisoners, under capitulation, to the American forces at Saratoga, commanded by General Gates.

A convention was entered into between the two generals, which provided, that the British army should be marched to the port of Boston, and should be allowed a free embarkation and passage to Europe, upon condition of not serving again in America. The army were not to be separated, particularly the men from the officers. Roll-calling and other merely formal duties were to be allowed. The officers were to be admitted on parole, and suffered to wear their

side-arms. All private property was to be retained, and no baggage was to be searched or molested. The army immediately took up its march for Boston.

Meanwhile, the greatest difficulty was experienced in making adequate preparations for this large body of men in the vicinity of Boston. The state of Massachusetts was at this time heavily taxed for the support of the war. She was supporting twelve thousand troops in the continental army, besides militia and those engaged on the sea-coast within her own jurisdiction; and had also incurred a heavy expense in preparing an expedition to St. John's, and other places on the Bay of Fundy, at the sole charge of the government and people of the state.

Under these circumstances, the quartering of these soldiers in Massachusetts was not regarded with much favor; and the people, who held General Burgoyne and his army in the utmost detestation, were not disposed to exert themselves very much for their accommodation. Under the command of General Heath, the barracks on Prospect and Winter Hills, near Boston, were made ready for the soldiers; but the utmost difficulty was experienced in procuring houses for the officers; and, on the day that General Burgoyne arrived, no quarters had been obtained for him.

Nor was this all. The scarcity of food and fuel was severely felt by the citizens generally, and by the soldiers to a still greater extent; and the difficulty was not remedied until the American commander seized all the fuel collected for private use lying on the wharves in Charlestown, and appropriated it

to the use of the prisoners. The latter, who were suffering under the bitter mortification of defeat, were indignant at what they considered harsh treatment, and took no pains to conceal their contempt for the people whose prisoners they were. The officers, in particular, seemed to forget the relation in which they stood to their captors, and indulged in a haughtiness and arrogance of manner, which were as unbecoming in them, as they were annoying to the American commanders. This conduct was met, however, with such firmness and determination as soon convinced the prisoners that they had mistaken the character of those, upon whose will they were then dependent. All the American officers were strictly enjoined to be attentive to the conduct of the prisoners, and forthwith to report any insult offered to the independence of the states or the proceedings of congress. The offender was to be immediately arrested, and, if a prompt and full apology was not made, he was to be confined to the guard-house for a time proportioned to the magnitude of his indiscretion. "Scarcely a day passed without a dozen arrests for this cause alone."

It is obvious, that, under these circumstances, causes of irritation would constantly arise; and, in point of fact, there were continual altercations between the parties, some of which were of an alarming character.

In the minds of the common soldiers, the ill-appointed army which conquered them at Saratoga contrasted strangely with their own splendid array, and they could not doubt that fortune and no merit

of their adversary had thrown them into his possession. Their mortification was heightened by their subjection to such a "slovenly and unhandsome foe." They paid no further respect to the rules and regulations of their captors than they were compelled to do by external force. They often stole out of camp, and not unfrequently committed depredations on the neighboring farms. Highway robberies were not uncommon, and, in one instance, a party of prisoners committed an aggravated murder. Passes were constantly counterfeited; and officers lent their side-arms, or suffered favored soldiers to take them, in order to deceive the sentries after dark. When this artifice was finally discovered, the prisoners who had a right to wear them were often stopped by the guards, and hence complaints without number of the insolence of the American sentinels.

Colonel Henley, who had the immediate command at Cambridge, was a brave man and a good officer; but being of a somewhat irritable and impetuous disposition, he had frequent personal collisions with the prisoners, in some of which, being pressed beyond endurance by the outrageous insolence of the soldiers, he adopted a course of punishment, which, to say the least, was scarcely consistent with the dignity of his position, although the circumstances were of a most aggravating character. On some occasions, this officer was placed in a trying situation, when the most decisive and energetic action was necessary. On January 8, 1778, a report was made to the commanding officer, that in the night before, a British

soldier had thrown a stone at a sentry, which had knocked him down, deprived him of reason, and nearly killed him. Search was immediately made for the offender and the sentry's musket, which had been taken off. The prisoners resisted the search, and, being armed with clubs and stones, prepared to attack the guard. They were charged, however, with clubbed firelocks, driven from barrack to barrack, and thirty of their number taken prisoners, who were ordered to be transferred to the guard-ship. Meanwhile the British soldiers again assembled, and were ordered to disperse. They in effect refused to obey, and pressed upon the guard, loading the Americans with the most insolent abuse. They also succeeded in rescuing one man, when decisive measures became necessary. Colonel Henley accordingly rushed upon the crowd with fixed bayonets, and himself pricked a British soldier with his sword.

As soon as General Burgoyne became acquainted with the facts, he addressed a letter to General Heath, the American commander, in which he demanded, in the most peremptory manner, the release of the prisoners who had been transferred to the guard-ship, "together with a satisfactory apology," and concluded in the following terms: "Insults and provocations, at which the most placid dispositions would revolt, are daily given to the officers and soldiers of this army. Regular, decent complaints are received by your officers, sometimes with haughtiness, sometimes with derision, but always without redress. These evils flow, sir, from the general tenor of language and conduct held by Colonel Henley, which

encourages his inferiors, and seems calculated to excite the most bloody purposes.

"For want of sufficient information, and not bringing myself to believe it possible that facts as related by common report could be true, I have hitherto declined taking public notice of this man; but upon positive grounds, I now and hereby formally accuse Colonel Henley of behavior heinously criminal as an officer, and unbecoming a man; of the most indecent, violent, vindictive severity against unarmed men; and of intentional murder. I demand prompt and satisfactory justice, and will not doubt your readiness to give it. Whenever you will inform me that a proper tribunal is appointed, I will take care that undeniable evidence shall be produced to support these charges."

General Heath immediately ordered a court of inquiry to investigate the grounds of the complaint of General Burgoyne, and the report was, that "it would be most for the honor of Colonel Henley, as well as for the satisfaction of all interested, that the judgment of a court martial should be taken on his conduct, during his command at Cambridge."

Accordingly a special court martial was ordered to sit at the court-house in Cambridge "for the trial of Colonel David Henley, late commanding officer at that post, accused by Lieutenant General Burgoyne, of a general tenor of language and conduct heinously criminal as an officer, and unbecoming a man; of the most indecent, violent, vindictive severity against unarmed men, and of intentional murder."

The court assembled on January 20, 1778, and continued by adjournments to the 25th of the follow-

ing month. The members were: Brigadier General Glover, president, Colonels Wesson, M. Jackson, Lee, H. Jackson, Lieutenant Colonels Colman, Badlam, Popkin, Major Curtis, Captains Randall, Langdon, Sewall, and Hastings. Lieutenant Colonel William Tudor was judge advocate.

Colonel Henley appeared before the court, and the following charge was exhibited against him: "Lieutenant General Burgoyne accuses Colonel Henley of a general tenor of language and conduct heinously criminal as an officer, and unbecoming a man; of the most indecent, violent, vindictive severity against unarmed men; and of intentional murder." To this Colonel Henley answered that he was not guilty.

The letter of General Burgoyne to General Heath having been read by the judge advocate, General Burgoyne took notice of a distinction between the charge, as stated in his letter, and General Heath's order. In the letter, the general tenor of Colonel Henley's language and conduct, encouraging his inferiors, and seemingly calculated to excite them to bloody purposes, was only stated as a matter of suspicious belief; reasoning upon this principle, it was more candid to suppose one instigator of such evils, than a general, voluntary, bad disposition among the American troops; that the direct matter of charge which the general pledged himself formally and officially to support, was contained in the words "behavior criminal as an officer, and unbecoming a man, of the most indecent, violent, vindictive severity against unarmed men, and of intentional murder."

General Burgoyne made this observation, as a security against any censure of inconsistency on his part, for not going at large into matters of inferior moment, as to the general tenor of language and conduct of Colonel Henley, declaring he should confine his evidence to transactions of the nineteenth of December and the eighth of January, except in cases where the behavior of Colonel Henley, at other times, served to elucidate the principles and designs upon which he acted upon those particular days. After making this observation, as to the distinction in the charge, the General opened the prosecution.

Mr. President, and Gentlemen of the Court:

I present myself as prosecutor before you, in charges of a heinous nature against Colonel Henley; —and, before I proceed to adduce the evidence in support of them, I think it a duty to my station, and a part of propriety towards the court, to declare the principles upon which I act. If the reports in my hand, and which will presently be brought to test upon oath, do not deceive me, public faith has been shaken, wanton barbarities have been committed, and a general massacre of the troops under my care, apparently threatened. In objects of this magnitude, where not only the rights of a single nation, but the interests of human nature are concerned, the conduct of the prosecution falls naturally (however disagreeable the office and unequal the talents of the person) to him who has the supreme trust upon the spot.

A second inducement to appear here, is that of private honor. I have undertaken to accuse Colonel Henley, in a degree that ought to affect the feelings

of a soldier nearer than life. It is fit I stand forth, in person, to maintain my accusation, and if it fails in point of proof, to make him the fullest atonement in my power.

I acknowledge a third impulsion upon my mind, equally irresistible; — gratitude, esteem and affection to that meritorious, respectable part of my country, the brave and honest British soldier — a private man, defenceless, because unarmed, ignorant of your laws, unqualified to make good his cause in a court of justice, and who has not to look for redress of injury to his own officers. I confess I am too selfish to resign to my brother officer the pride and gratification of standing in the front, for the defence of men, faithful comrades of honor and misfortune — who have fought bravely under my orders, who have bled in my presence, and who are now exposed to oppression and persecution, by the abuse of a treaty signed by my hand.

Thus much I thought proper to premise, lest any man should suppose me actuated by so mean and paltry a motive, as vindictive personal resentment against a gentleman too, of whom, before these transactions, I could know no harm, and towards whom, if I had any prejudice, I seriously declare it was, from his general deportment, a prejudice of favor. Personal resentment! — No, gentlemen, I stand upon broader and firmer ground — the ground of natural rights, personal protection and public honor, — and I appeal to the great principles and landmarks by which human societies hold and are directed, and which, whether in situations of amity or hostility, are es-

teemed equally sacred by the universal concurrence of civilized man.

And this leads me to a momentary reflection upon the order under which you sit, originating from the report of the court of inquiry. It states, that the court, after mature consideration, are of opinion, that from the evidence offered on the side of General Burgoyne against Colonel Henley, it will be most for the honor of Colonel Henley, as well as for the satisfaction of all interested, that the judgment of a court martial should be taken on his conduct, during his command at Cambridge. The General approving the opinion of the court, orders, &c.

I confess I expected General Heath would have joined issue with the prosecutor, in this instance, and placed the court martial upon a more enlarged basis than the honor of an individual, however respectable he may be, or the satisfaction of the complainants. But be it as it may, my purpose is answered, a court martial is obtained, the members are sworn, and they are bound to decide.

I know you will feel with me the difference between this and common courts; such a state of the minutes as would suffice for your internal conviction, after hearing the evidence, or as would be merely explanatory to the person who is to confirm the sentence, will not be thought sufficient here. You well know the whole of this matter will be published, translated, considered and commented upon by every nation in the world; — not only reality, but perspicuity of justice must appear upon the face of the proceedings. You are trustees for the honor of an infant state, and

therefore evasion, subterfuge and law-craft,[1] were any man hardy enough to offer such at your tribunal, would be of no avail; nay, were it possible any member could be warped unintentionally by personal favor, or prejudice of civil contest, (good minds are sometimes prone to such illusions) yet here a moment's reflection upon the reputation of his country, would retrieve his reason, and what his prejudice would incline him to adopt, policy would prompt him to reject.

Upon the full confidence, therefore, of the necessary, as well as willing justice of the court, I shall proceed to call the evidence. I have neither inclination or powers to heighten the facts by a previous narrative; let them strike the view as truth shall show them in all the simplicity of their horrors — a monstrous spectacle, from which the mind and eye will turn aside with detestation.

Upon the conclusion of General Burgoyne's address, the witnesses were sworn and examined. In the course of their testimony there is much profanity, which good taste would require to be omitted; but as the most important point at the trial was to ascertain the *state of mind*, not only of the accused, but also of the witnesses and the soldiers, it seems necessary to print their exact expressions.

Corporal Buchanan. I was present at the barracks on Prospect Hill on the nineteenth of De-

[1] In allusion, as Anburey says, to the judge advocate, who was a lawyer in Boston, and whom this writer styles "a little, vain, conceited fellow."

cember. Colonel Henley came down and ordered a number of the British soldiers, who were prisoners, out of the guard-house. He addressed himself to Corporal Reeves, with the rest of the prisoners, inquiring what he was confined for? Reeves said that he had affronted one of the provincial officers, not knowing him to be an officer, and he was sorry for it. Colonel Henley replied, "Sir, if you had served me so, I would have run you through the body, and I believe you to be a great rascal." Reeves made answer, "Sir, I am no rascal, but a good soldier, and my officers know it." Colonel Henley then demanded silence. On this, Reeves repeated, "I am no rascal, but a good soldier, and I hope soon to be under the command of General Howe, to carry arms, and to fight for my king and country." Colonel Henley said, "Damn your king and country — when you had arms you were willing to lay them down." Reeves said he was not willing to lay them down. Colonel Henley then ordered silence; Reeves not obeying his orders, but repeating the same words, Colonel Henley ordered one of the guard to run him through the body: the man not obeying him, Colonel Henley immediately dismounted from his horse, and seizing a firelock with a fixed bayonet from one of the guard, stabbed Reeves in the left breast; while the bayonet was at Reeves's breast, Colonel Henley told him if he said another word, he would have it through his body. Reeves said he did not care, he would stand for his king and country till he died. Colonel Henley then made another push at him, when I threw up my hand and turned

the bayonet over Reeves's shoulder. I told Colonel Henley the man was a prisoner, and said, "don't take his life; as he is now in your custody, you can take other means with him." Colonel Henley then returned the firelock to the man of the guard he took it from, and then ordered Reeves and myself into the guard-room, and dismissed the rest of the prisoners.

General Burgoyne. When Colonel Henley made the second pass at Reeves, where would it have struck him had you not thrown the bayonet up with your hand?

"Much about the same place in the left breast."

"When Colonel Henley demanded silence, did he direct himself particularly to Reeves?"

"I can't tell, as there was ten or a dozen prisoners who were making their excuses together."

"Was there not much noise made by the prisoners?"

"There was, as they were all speaking together."

"What kind of noise was it?"

"It was excusing themselves to one another, so that Colonel Henley might hear them; that they had been confined there for some nights, and they should take care not to come there again."

"Was there any other sort of noise or laughing?"

"No."

"Was there any muttering or grumbling, or insolent looks directed to Colonel Henley?"

"No, but quite the reverse; the men seemed pleased at being released."

Alexander Thompson, of the twenty-ninth regiment. I was at the barracks on Prospect Hill on the

nineteenth of December. Colonel Henley ordered the prisoners out of the guard-house, of whom I was one. The prisoners were drawn up before the guard-room window, the guard in their front. Colonel Henley pulling a paper out of his pocket, began to read the crimes at the right of the line of the prisoners, and said, "Now soldiers I am come to release you, and hope you will behave better for the future." Colonel Henley, directing himself to Corporal Reeves, told him he was confined for abusing an officer of the continental service; and asked him what was the reason of his abuse? Reeves replied he did not know the reason of the abuse, as he was in liquor at the time, but said he was very sorry for it, not knowing him to be an officer. Colonel Henley then said, "Had it been me, I would have certainly run you through the body," and added, "I believe you to be a rascal." Reeves said he was no rascal, but was a good soldier, and his officers knew it. Colonel Henley demanded silence, and Reeves again said that he was a good soldier, and hoped, in a short time, to fight under General Howe for his king and country. Colonel Henley then said, "Damn your king and country; when you had arms you were willing to lay them down." Corporal Reeves made answer that he was not willing to lay them down, and had he then arms, he would do his utmost to fight for his king and country. Colonel Henley then ordered one of his guard to run the rascal through. The man not obeying, he immediately dismounted his horse, seized a firelock with a fixed bayonet from one of the guard, extended his arm above his head, with his

hand on the but of the firelock, and made a pass at Corporal Reeves, and pricked him near the nipple of the left breast; he then drew back the firelock and made another pass at him. I then seized hold of the socket of the bayonet, and begged of Colonel Henley not to take his life, that he might use other means of satisfaction, and begged he would send him into the guard-room again. Colonel Henley then ordered Reeves into the guard-room, the guard committed him, and Colonel Henley went on to speak to the rest of the prisoners. Reeves put his head out of the guard-house window and said something, but I do not know what. Colonel Henley then released the rest of the prisoners, except Buchanan, who was ordered into the guard-house.

The President. Was there nothing said by Reeves between the first and second pass of Colonel Henley?

"To the best of my recollection there was not."

"Did not Colonel Henley frequently command silence before he stabbed Reeves?"

"I believe he did more than once or twice."

"Did not Colonel Henley direct himself to Reeves when he demanded silence?"

"He looked first at Reeves, and then along the line of the prisoners."

"Was not Reeves more talkative than any of the other prisoners?"

"He was."

"Was there anything said about king Hancock?"

"I heard nothing."

The same question was put to Buchanan, who answered, "Not till after Reeves was returned to the guard-room, and the other prisoners dismissed. Reeves then said to me, 'This is a poor pass I am come to, to be taken out of the guard-house and stabbed, and my king and country damned—damn king Hancock and the congress.' Whether Colonel Henley heard it or not I can't say; he might have heard it. This discourse was between Reeves and myself, as we stood near the guard-house window."

Dr. Bowen, surgeon of the ninth regiment. I saw Corporal Reeves a few hours after he was wounded; the wound appeared to be made by a bayonet, it penetrated the breast a little above the left nipple; the wound was not so bad as to require immediate dressing; the wound was slight, it did not penetrate deep enough to be of any consequence; it might have drawn a drop or two of blood.

General Burgoyne. What further depth would have put his life in danger?

"An inch farther might have rendered the wound hazardous."

"Was the direction of the wound towards the heart, or a mortal part?"

"It was not towards the heart, but towards a mortal part."

Page, a soldier of the twenty-fourth regiment. I was at the barracks, on Prospect Hill, on the 8th of January. About 11 o'clock in the morning, I saw a guard of continental soldiers coming up from Winter Hill; when they came near the British guard-house

a number of us were standing to see them march by. I happened to tread on one of my comrade's toes, and he cried out, "God damn my soul," when a sergeant (as I took him to be, as he was out of the ranks) turned about, stepped back two or three paces, and stabbed him in the right breast; then drew out his bayonet from the man's breast, and said to the man, "Damn you, you rascal, do you damn me?" the soldier made answer, "No." I likewise said that he did not speak to him; he then made another push at him, and pricked him the second time, and then clubbed his firelock and cut him on his right temple; a provincial officer came from the rear of the party and damned us for rascals, and told us we all deserved it.

"Did you see Colonel Henley at or near the party during this transaction?"

"I did not."

"What number of British soldiers were together when the party passed them?"

"There might be fifty or sixty."

General Burgoyne. What number did the provincial guard consist of?

"I guess about one hundred and fifty."

"Did you see any insult by word or gesture passed from the British soldiers towards the guard?"

"I did not."

"Did you hear any provincial officer or soldier complain of any affront offered?"

"I did not, except what passed as before related."

The President. Did the British soldiers give the

party full room to march in the same open order after they came up to them as before?

"There was full room where I stood for the party to pass."

Walker, surgeon's mate, of the twenty-fourth regiment. On the 8th of January, about 11 o'clock, I dressed a British soldier, who had just before been wounded; his name was Traggot; there were two orifices just above the right breast, which the man told me had been done by two different stabs of the bayonet; from the free communication of the two orifices I should have thought it had been only one wound; the wound was not dangerous. I have dressed it several times since, and at present it is in a fair way of a cure; I saw no other wound nor any marks of beating about the man.

"Are you satisfied that the wound was made by one stab of the bayonet, or more?"

"I am of opinion, from the nature of the wound, it was done by one push."

"Did the man complain of any other wound?"

"He did not."

Major Foster, of the twenty-first regiment, testified that he was present on the occasion referred to. He neither saw nor heard any provocation on the part of the British soldiers towards the continental guard. When the rear of the guard came near the British guard-room, he noticed a scuffle. The guard passed on, and he found Traggot, a British soldier, was wounded. He ordered the men to disperse, and they did so immediately. Corporal Kidley testified to a wound inflicted on another soldier, on the same

occasion. Several other soldiers testified that Colonel Henley came up with a party of American soldiers, and after forming them into two columns, ordered them to load. He told them that the first man who rescued a prisoner out of his hands, he would blow his brains out. He then ordered the British soldiers to leave the parade immediately. They moved off, but Colonel Henley, finding that they did not move as fast as he expected, rushed forward and stabbed Corporal Hadley. He followed another soldier, threatening to run him through if he did not go off the parade. The wound of Hadley was not severe, and he was only confined by it a short time.

On the same day, after this difficulty, Colonel Anstruther, the British officer in command, called on Colonel Henley, who informed him that the British soldiers had behaved so badly that morning, that he was obliged to run one of them through the body, and that some others had been hurt by his men's bayonets.

The next charge or circumstance, brought against Colonel Henley, related to an occurrence on the 22d of December, when it was alleged that a provincial sentry fired at a woman. There was but one witness who testified to this occurrence.

Colonel Lind, of the twentieth regiment. On or about the 22d December, being field-officer of the week, I was going upon Prospect Hill, in the forenoon, with Captain Banks, of the same regiment. I saw three women coming down the hill, one of which run past a continental sentry, who called upon her to

stop, and immediately fired his piece before she had time to turn round; the ball, from the noise, passed between the woman and myself, and near me. I ordered the woman to go back, and went up to the sentry, and asked him if he was not ashamed to fire upon a helpless woman; he replied he had orders for so doing. I then went to a sergeant's guard, which was just by, told the sergeant what had happened, and desired him to confine the sentry, that the affair might be inquired into; he told me he would not confine him; that they had orders to fire upon all British soldiers and women, who attempted to pass the sentries. I observed a number of British soldiers were collecting, who were murmuring and clamoring at the time. I therefore, for fear of the consequences, desired them immediately to disperse and go to their barracks, and promised them my endeavor to get them redressed. I then went towards the main or captain's guard, and in my way was stopped by a provincial sentry, who charged his bayonet upon me, with the muzzle pointed at my breast. I told him I only wanted to speak to the captain of the guard, and did not want to go further, and begged he would call him, and remove the muzzle of his gun from my breast; he said he would keep the muzzle there, and bid me keep off, and then called the sergeant of the guard, who immediately came up, who I desired would order the sentry to remove his firelock, as I was an officer, and commanded in the barracks, and wanted to speak to the captain of the guard upon business. The sergeant told the man to take away his gun, telling me he was a young soldier, and did

not know better; the captain of the guard came up soon after, and I pulled my hat off, which he took no notice of. I then told him the action of the sentry's firing on the woman, and begged the sentry might be confined till the affair should be inquired into; he told me that he would not, and that the sentries had particular orders to fire on all women who attempted to pass the sentries, as well as soldiers. I observed it must be some mistake; he replied it was none of his business, they were his orders, and I must seek redress somewhere else, and we parted.

"From the position of the sentry at the time he fired, were not passengers on the road exposed to the shot?"

"Most undoubtedly."

"Was any report of this transaction made to Colonel Henley?"

"Not that I know of."

The next occurrence which was inquired into, took place on the 16th of December.

John Fleming, sergeant of the forty-seventh regiment. On or about the 16th of December, I was at the door with a number of the sergeants of the office, to apply for passes. I mistook Colonel Henley for Mr. Keith, the Deputy Adjutant General, and saluting him, was just going to address him, when Colonel Henley extended his arm, with his fist clinched, and exclaimed, "You rascal, I'll make damnation fly out of you, and I will myself one of these nights go the rounds, and if I hear the least word or noise in your barrack, I'll pour shot amongst you, and make flames of hell jump out of you, and turn your barracks inside

out; ye are all a parcel of rascals." In the discourse he said if he was a sentry, and a British soldier looked sulky at him, he would blow his brains out.

"Was there anything that brought on this discourse on your parts?"

"Nothing."

"Did Colonel Henley mention no circumstance which could account for such violent expressions?"

"After being asked by me whether anything was amiss, he said there was, for that the last night one of his sentries had been knocked down by some of our people; he moderated his passion, and a very few words passed afterwards."

After the testimony was in, General Burgoyne proposed to address the court upon the facts as proved. To this the judge advocate interposed an objection. He contended, that in courts martial there was no prosecutor but the judge advocate. There had been instances of counsel being allowed a prisoner, but not against him. Still, if Colonel Henley had no objection, and the court conceded it as an indulgence, he should acquiesce.

General Burgoyne expressed surprise at the judge advocate's exception being made so late in the cause; he thought it more particularly extraordinary, as the general had not only stated his idea of the mode of proceeding at the first, in which the judge advocate had acquiesced, but at the last meeting it had been fully discussed in open court between them, and the judge advocate had agreed to his right, both of applying the evidence upon the charge, and also of replying to the defence, provided the judge advocate had

the closing of the whole. He averred that, had the court declared against this claim in the beginning, or could he have expected such objection, he should have examined the witnesses in a very different manner, in order to bring several matters more fully and pointedly before the court, than he thought necessary to do upon the supposition of a future occasion, to explain the reasons of his questions, and by deduction and inference to make the application. The general nevertheless proposed that the principle upon which he spoke should lie dormant to avoid trouble to the court; that he had his own opinion upon the right, the judge advocate might retain his upon the indulgence, and provided nothing concerning the matter was entered upon the proceedings, he should make use of the power without further question.

Colonel Henley. Mr. president, and gentlemen of the court; I have no objection to General Burgoyne's making use of all the rhetoric in his power against me; I stand on such firm ground, I can safely trust my reputation in your hands, against every effort of my prosecutor to ruin me.

The court, after consultation, informed General Burgoyne that he might proceed, and he addressed them as follows.

Mr. President, and Gentlemen of the Court:

It being now admitted, that in closing the evidence I may offer such arguments as to me shall seem proper, in support of the charge, and reserving to myself a claim of replying to the defence, I shall enter upon

the first part of the very painful, though by no means difficult undertaking — painful, because I cannot pursue the offender without setting that offender in points of view, at which every benignant mind must shudder — easy in every other respect is the task, because I will venture to pronounce the evidence, when arranged and adjusted, will amount to such a mass of proof as cannot be overthrown, and will authorize and call for the strongest terms I can use, in my demand of public justice. And, gentlemen, let me be permitted to assume to myself applause rather than blame, that the evidence has not been laid before you in a regular series; the reason was, that though assured by the reports made to me, that the evidence would produce conviction upon the whole, I was ignorant how the testimony of the particular witnesses would apply, and point to the progression of the charges, because I had no previous intercourse with them. I declare, upon my solemn word and honor, that I had no concern or communication, directly or indirectly, with any noncommissioned officer or soldier who has appeared at your bar, one only excepted, namely, Sergeant Fleming, of the forty-seventh regiment, who has deposed to the salutation Colonel Henley gave him and his comrades at the Adjutant General's office; the whole matter appeared so very improbable, that I not only sent for the sergeant, to warn him of the sacredness of an oath, and the crime of intemperate zeal that led to bearing false witness; but also I thought it my duty to inquire minutely into his character. I found the man firm and uniform in as-

serting his facts; and I found his officers unanimous in supporting the credit of his veracity.

In every other circumstance I adhered religiously to the determination I had taken, of secluding myself from the witnesses, not only to guard my character, in this region of suspicion and aspersion, against the supposition of unfair practices; — I besides had a scruple of trusting my own mind with too hasty prepossessions in a cause where, with the solemn matter of a public nature, is involved the fate of a gentleman, high in his military station, and to judge by the apparent signs of good wishes on this day, high in popular esteem.

Thus unprejudiced I came into court. I scorn to take the slighter matters that might be comprehended in the general words of the charge, such as personal incivility to the officers, expressions and actions of peevishness, haughtiness and disgust. I mean not to press, that they existed, or if they did, I am desirous that they should pass as faults of temper and deficiencies of manners, incident to man's nature, education, and habitual course of life; and I shall confine my comments, as it is my duty to do, to the testimonies of your minutes, and the circumstances relating to them.

Without departing from this principle, it will be necessary to take a general view of the state of things previous to the date of the grievances complained of. We arrived at Cambridge, passengers through your country, under the sanction of a truce. In whatever capacity we had been found in a foreign, and as you intend, an independent state, we were entitled to a

personal protection, by the general and most sacred laws of custom and reason; but when, to the promulgated law of civilization, are added, the unwritten principles — or written only upon the hearts of generous people — honor, respect for the brave, the hospitable wishes that usually press to the relief of the unfortunate, the stranger, and the defenceless man in your power, how will our claims multiply upon the mind! Sanguine imaginations conceived yet further motives for kindness; there were among us men so vain as to believe, that notwithstanding the separation between us, the different duties we now maintained, the prejudices of political zeal, and the animosity of civil war — yet still the conflict over, it might be remembered we once were brothers, and the more especially, as it was impossible, by the convention of Saratoga, that the generality of us should ever oppose America in arms again.

We were led into these delusive hopes by the very honorable treatment shown us by General Gates, by that we received from you, Mr. President, when you conducted us upon the march, and by that we afterwards found from the worthy member of the court near you, who had the immediate command in this district upon our arrival, and to whom, most happily for us, the command is now again devolved.

The first symptom we discovered of any uncandid design, was the mode established for correcting errors and disturbances in the troops of convention; men were taken up, imprisoned and otherwise punished by the American troops, without any prior reference to their own officers. I very well know with how much

slight and severe derision my sentiments have been treated on this subject, but I still insist, that after taking up men for faults, to have applied to the officers of the convention troops, in the first instance, for their punishment, would have been consonant to every principle of decorum and good policy, not meaning to deny, that upon any proof of partiality or connivance, or undue lenity, it then became a proper and indispensable duty of General Heath, to take the distribution of justice into his own hands.[1]

The contrary maxim having been established, let us examine, in point of time, though the last in the proceedings, that burst of independency, scurrility and impiety, from Colonel Henley to the Quarter Master Sergeants at the Adjutant General's office. It is not without difficulty I can frame my mouth to read the words, as they were delivered upon oath, by that very respectable witness, Sergeant Fleming; "You rascals, &c. I'll make damnation fly out of you, and I will myself, one of these nights, go the rounds, and if I hear the least word or noise in your barracks, I'll pour shot amongst you, and make flames of hell jump out of ye, and turn your barracks inside out."

The court will remember, that when this evidence was given, it rather excited laughter in some part of the audience, than any serious condemnation; this

[1] When the British troops first arrived at Cambridge, the officers wished to have the sole jurisdiction of all offences committed by their own soldiers. The American commander admitted that the British officers might command and punish, for the purpose of internal order and obedience; but the exercise of his own command, and the enforcement of his own orders, when necessary, was a jurisdiction which the British officers must not expect to exercise. Heath's Memoirs, 136.

day it seems to make a very different impression — the minds of all around follow me while I contend, that expressions so wild, so unfit, so unprecedented, from the mouth of a gentleman, argue the most horrid passions boiling in the breast — the very enthusiasm of rage and malice. I defy any man to divest himself of that idea; it will attend the mind through the whole course of the proceedings, and cast a shocking glare over every subsequent transaction, of forethought intention, and bloody resolution.

It is very material to observe, that this demonstration of Colonel Henley's mind was on or about the 16th of December, and it was no longer than till the 19th, before he confirmed, by an overt act, the principles he had professed. The stabbing of Corporal Reeves is proved by the evidence of Corporal Buchanan, Alexander Thomson, and Robert Steel. I shall quote indiscriminately from the testimony of these witnesses, because though one may recollect a few short passages or words more than another, there is not a shadow of contradiction, and I am confident there never was an instance where truth was laid before a court by united evidence, more perspicuously.

It has been sworn, that on the morning of the 19th of December, Colonel Henley went to the barracks, on Prospect Hill, to release some British soldiers, who were prisoners; that having paraded them he read over their crimes, and coming to Reeves, told him he was confined for insulting a provincial officer. Reeves made answer, he was sorry for it; that he

was in liquor, and would not have acted so had he known him to have been an officer.

I pause here to apply to the feelings of the court, whether a more decent, proper and satisfactory excuse could have been conceived — what did it draw from the colonel? "Had it been me you served so, I would have run you through the body, you rascal." Continue the comparison between the language of the colonel and the corporal: "Sir, I am no rascal, but a good soldier, and my officers know it; and I hope soon to be with General Howe, and fight for my king and country." What did this produce from the colonel? "Damn your king and country," and an order to the guard to run him through the body. Not a hand nor a heart could be found for the butchery. The colonel, enraged at the virtuous disobedience of his men, leaps from his horse, seizes a firelock with a fixed bayonet, and strikes at the man's heart. I call upon the gentleman of a learned profession near me, to inform the court, when he sums up the evidence at the close of the trial, whether this act would not constitute malice prepense in law. I mean, that admitting, for the sake of argument, there had been such provocation given, as would have justified a man having an offensive weapon to make use of it instantly, which would have been only manslaughter, whether the intermediate act of dismounting a horse, and taking a firelock from the other, implying time for recollection, would not have constituted the act of wilful murder, had the man died. Consider now, gentlemen, what followed: the brave corporal, in the instant expectation that his words would cost him his

life, persevered, "I don't care, I will stand by my king and my country till I die!" The action would have charmed a brave man; it would have been a spell upon his arm, and kept the stroke suspended beyond the power of witchcraft. What effect had it upon the colonel? To provoke a second stab, which was only diverted by the intervention of the man next him, who caught hold of the bayonet and threw it up.

Gentlemen, when I say the perseverance of the corporal ought rather to have pleased than provoked, I speak not vaguely or romantically — I feel conscious proof of the truth; and when I consider the actions of a Washington — when I meet in the field a Gates, an Arnold, a General Glover, and see them bravely facing death in support of their principles — though I would shed my last blood upon a different conviction, I cannot withhold from the enemy the respect due to the soldier; and, the immediate conflict over, he robs me of my anger, and seizes my good will.

Gentlemen, in the different parts of the examination upon this fact, many questions have been asked by the prisoner, by the judge advocate, and by the court, respecting the appearance of the prisoner's temper. Was he not in a mild mood? Did he not seem good-humored? Mild murder — good-humored murder — are phrases, I fancy, will not convey any clear meaning, till men change their ideas of that crime! We hear, it is true, sometimes, as a sort of proverb, to mark the utmost malignity and treachery, of a man smiling in your face while he cuts your throat; but, I believe, such smiles were never pro-

duced as excuses or extenuation of guilt. These questions, therefore, as I conceive, can have no tendency but to insinuate, that Colonel Henley's passion was entirely raised by the immediate provocation he received. I am ready to join issue upon this argument, and if the gentleman will rest his cause upon it, I will relinquish the proof established of Reeves's decency and consistency, and give him latitude for all the provocation he can suppose, short of personal assault, and the necessity of self-defence, which I am sure will not be pretended. Transpose, if he pleases, the time when Reeves is proved to have talked about king Hancock, and bring it back to the instant where it was attempted to be introduced as a substantial matter of provocation. He shall add insolence of gesture to abusive terms, and under all these fictitious circumstances, I will take the judgment of the court, whether Colonel Henley, with full powers to imprison, and to punish by regular, decent, legal proceeding, has a shadow of justification for making himself, in his own person, party, judge and executioner.

From the 19th of December, the hands of Colonel Henley were imbrued in blood, till the 5th of January; but it evidently appears upon your proceedings, that the influence of his example, and the encouragement of his precepts, failed not to operate. As the first proof of it, I request the attention of the court to the testimony of Colonel Lind, concerning the position of the sentry, which was such as must necessarily affect every passenger upon the public road, whenever he fired; and at the same time with a readiness to do mischief, so marked, that he took women

for his objects, and would not give them time to turn round; he had orders so to do. Let the behavior of the next sentry, to whom Colonel Lind applied, concerning the ungentlemanlike behavior of the officer, with his confirmation of the whole proceeding, being *according to order*, be combined and compared, and it must universally strike common sense, that these were several parts of one determined plan to diffuse the seeds of discord and fury, in order afterwards to countenance a general havoc.

But, it may be said, the orders under which the continental troops acted, were not those of Colonel Henley, but of a superior. Will that be pleaded? Was the position of the sentries to kill or wound three or four passengers at a shot, the firing upon women, the refusal of redress to Colonel Lind, with all the indecent manner and language attending — will these circumstances be alleged to have proceeded from superior orders? If so, the excuse, indeed, becomes more alarming to us. It is not my part, at this time, to drop a consideration that would lead far on that subject. I shall only remark, how little the excuse would benefit Colonel Henley, who would still remain a cruel agent of — (I will use no improper terms) I will only say, a cruel agent of too hasty principles.

Colonel Henley has asked, whether complaints were made to him of the transactions of the 22d. I believe there were not — but I dare say he will recollect the reason — other grievances of the most atrocious nature, abuse of officers, and assaults upon their lives, were preparing to be laid before General Heath:

they were in number, and in time, to have filled up a much longer interval than between the 19th of December and the 8th of January, and not brought before this court, because I understood it to be the intention of General Heath they should be separately inquired into. Enough has appeared to show how the system of persecution was preserved, and I come now to the transaction of the 8th of January.

Upon a general view of that black day, I am at a loss where first to carry your observation — the field was extensive, the scenes separate and successive, but evidently guided by one uniform design. In one place, a party on the march are stabbing and knocking out the brains of innocent spectators — at another, men, under pretence of a prisoner's escape, are glutting the same bloody purposes upon men not pretended to be concerned — in a third, Colonel Henley, in person (the British officers at the same time being denied admittance) is running men through the body with his sword.

The first of these complicated horrors, in point of time, was the attack first with the bayonet, and afterwards with the but end of the firelock. I will read the evidence, without a comment, and I have only now to remark, it is rather a prepossession in favor of the continental troops, to suppose that such malicious treatment could proceed from a general sentiment; no body of people are so barbarous, unless instigated, and now is the time to call upon the learned gentleman near me, for another duty of his office, to expound to the court the principles of law, respecting accessories and accomplices, and to say whether a

man, by order, advice, example, or any other encouragement, influencing another to do a mischievous act, is not *particeps criminis*, at an hundred miles distance, as much as if present on the spot.

The stabbing of Wilson follows in course of the evidence. And it appears as little comment is necessary upon this, as upon the former action, further than to remark, that in this case, Colonel Henley is found to be accessory, not upon circumstantial, presumptive and argumentative, but upon positive proof, for it is sworn the action was done in his sight; that he made no attempt to prevent it, and though it be alleged, and even admitted, that he was at too great a distance, yet his giving no reprimand nor check to the soldiers, upon seeing the act committed, carries as direct a conviction of approbation and encouragement, as if he had given open applause.

The last act to mark the thirst of blood, is the stabbing Corporal Hadley, and following Winks with threats of the same fate. It would be superfluous to expatiate upon the strength of the proofs, the concurrence of witnesses, that there was no provocation to this deliberation and wantonness of barbarity. The intention is so clear, in my opinion, against the probability of doubt, that I should not touch a moment upon it, were it not that a very grave application was made to the court, by the most respectable authority in it, to consider of the nature of the wounds, as matters of the greatest importance, and question upon question was put to the surgeon, in every case, to find whether they were dangerous or not. Is it possible that any gentleman can mean to measure the degree

of the crime by the depth of the wound, and to argue that a man may thrust a weapon into another's breast with impunity, provided he does not touch a mortal part! If this doctrine holds good, you ought to establish schools of anatomy for the education of young officers; the science of dissection should be added to the skill of the fencing-master, to train the pupils to that nicety of touch, that can feel to a hair's breadth between death and life; a sort of fiddlestick dexterity, that can run divisions upon veins and arteries, and stop short in time and tune to the thousandth part of a second. Really, gentlemen, I am not willingly ludicrous upon this subject, but it is impossible to treat such an argument gravely. I dismiss it to my learned neighbor, with one more injunction to show the court, in law, that where a man passes a sword with violence at another's breast, whether the wound is a mere puncture, or goes to the hilt, the intentional guilt is the same. I have only one matter further to observe, upon the cross-questioning of the witnesses. It has perhaps been wished to insinuate, that at the time of these violent proceedings, there was cause of apprehension the armed troops might be surrounded and overcome. The troops themselves will hardly thank their friends for that idea! What, shall it be alleged that the militia of America, who, animated by their cause, have been self-taught the use of arms; that body, where every man is supposed himself to be a host — shall such soldiers be apprehensive of danger, from half their number of unarmed, mercenary, ministerial slaves, for such I know they think us! No, gen-

tlemen, I reject with you so injurious a supposition ; I give credit to the spirit and force of your militia ; — I do it seriously and upon experience, and it is upon that credit I found this proposition, that it being impossible the officers and soldiers should be induced to acts of violence, by any apprehension of resistance, it follows, by the fairest deduction, that either there was more prevalent malignity than ever appeared before in the human heart, or that the whole proceeded from direction, order, and a systematical plan.

Little more, I imagine, need be remarked, to apply the evidence to the several distinct terms I have used in the charge. That the whole tenor of Colonel Henley's conduct was heinously criminal, as an officer, will hardly be disputed, in a country where the principles of liberty have been so deeply studied. An army is not to be borne in a free state, but upon the principle of defence against an outward enemy, or the protection of the laws. The officer who makes himself the arbiter of the law, is guilty of the most shameful perversion of moral duty, and his impunity would scarcely be thought a very comfortable presage of the growing liberties of his country.

I have also said, the colonel's behavior was unbecoming a man. I will not trifle with the time or understanding of the court, to enter into definitions upon this term, nor will I shock the ears of officers, nor even of the unfortunate person under trial, with so gross a term as the world in general apply to the act of assaulting a woman, a priest, or unarmed man, for they are all exactly in the same predicament. The sword drawn for such a purpose is no longer the

badge and distinction of a gentleman; it is degraded with the implements of the assassin and hangman, and contracts a stain that can never be wiped away.

Gentlemen, I have now gone through the material parts of the proceedings; whether the offences are resolved into vindictive resentment, or more deep design, or both, it must still appear wonderful that a general massacre did not ensue. By the patience and the discipline of the British soldiers, those horrors have been avoided; but whatever the escape may have been upon our part, it is tenfold more material on yours. We might, *perhaps*, for the struggles of the desperate are hard — but, *perhaps*, we might have been sacrificed to the last man — we should thus have paid a soldier's debt, which we have often risked; our fall would have been revenged, and our memories attended with pity and honor. But for America, the transactions would have remained a foul and indelible blot in the first page of her new history, nor would any series of disavowal and penitence, nor ages of rectitude in government, purity in manners, inflexible faith, or the whole catalogue of public virtues, have redeemed her in the opinion of mankind.[1]

Now, gentlemen, consider the words of the order under which you sit — reform the opinion of the court of inquiry, and say, whether it is the *honor* of Colonel Henley, or the honor of America, by which your minds ought to be impressed, when they proceed to judgment in this cause. I close with that consideration, as far as I can impress it upon your breasts.

[1] Here, says Anburey, the court was struck with much awe, and seemed to be impressed with a resolve to act impartially!

I trust they are replete and pregnant with justice, honor, and duty to your profession; and above all, with that glorious whig principle, the words of which are become almost a general motto in this country, and the genuine substantial practice of which I shall ever revere in any country, a due sense of the general rights of mankind. I trust you have all these qualities, and in that persuasion, I cannot doubt what will be the issue of the cause."

Upon the conclusion of this address, the judge advocate declined making any observations on the evidence, until the witnesses in behalf of Colonel Henley had been examined. He renewed, in this stage of the proceedings, his objection to General Burgoyne's making any remarks upon the evidence, regarding it as improper, and a dangerous precedent. Colonel Henley was then called upon to make his defence, but declined at that time to enter into a detail of his conduct as connected with the charge. He only requested that the witnesses in his behalf might be examined; and stated, that if any remarks in his own vindication should seem necessary, he would submit them afterwards.

Major Swasey. I was present with Colonel Henley, at the guard-house on Prospect Hill, when he wounded Corporal Reeves. I attended him there with a design of inquiring into the offences of several British soldiers, who were confined in the guard-house. Previous to this step, I had acquainted Colonel Henley with General Heath's orders, which were to release those prisoners whose crimes were trifling:

those who had insulted any inhabitant and refused making any atonement for the affront, were to be sent on board a guard-ship. When we came to the guard-house, the prisoners were ordered out and paraded. I examined the charges of each, and finding Buchanan and Reeves, who stood together, were confined (Buchanan for insulting and striking an inhabitant, Reeves for insulting an officer,) we passed these two over as not subjects of releasement. After learning the other prisoners' offences, Reeves was called upon to relate how he got into confinement. He mentioned the circumstances, and closed his narrative by repeating a low and very abusive expression, which he had made use of to the officer who confined him; on which I told him he was an impertinent rascal for treating any person with such language. He replied he was no more a rascal than I was, that he was a good soldier. On this I ordered silence, and threatened if he did not stop his impertinence I would lay him over the head with my whip. He kept on his talk, and Colonel Henley dismounted his horse, after bidding the fellow be silent to no purpose, took a firelock with a bayonet from one of the guard, and told Reeves if he said another word he would run him through; Reeves replied he might do it, if he pleased; upon this Colonel Henley made a lunge at him, and pricked him in the breast. Reeves continuing his insolent language, Colonel Henley stepped back and made a motion to cock the firelock, and told him if he was not silent he would blow his brains out. One of the British soldiers finding Reeves was not to be silenced, begged of the colonel

to return him to the guard-house. Buchanan and the other British soldiers begged the colonel not to take notice of the affair, for Reeves was drunk. On this Reeves damned them, and said he was not drunk. He was ordered into the guard-house. I do not remember that much swearing passed, nor can I recollect the words of insolence used by Reeves. After Colonel Henley had pricked him, Reeves said he was a good soldier, and he would fight for his king and country as long as he had breath, and hoped that he should soon be with General Howe, that he might seek revenge.

"Did it appear to you that Colonel Henley's intention, in making the pass at Reeves, was to injure or to frighten him into silence?"

"Only to silence him; for had the colonel extended his arm, he might have run him through with the bayonet."

General Burgoyne. Did you hear Colonel Henley order any of the guard to run Reeves through the body before he dismounted from his horse?"

"I did not; but he might have done it."

"In what position was Colonel Henley when he made the pass?"

"He had his right hand on the but of the firelock, and the left grasping the stock."

"Did you hear Reeves apologize to Colonel Henley for insulting the officer?"

"He said he did not know him to be an officer."

"Did you not think Reeves's insolence of language as much directed to yourself as to Colonel Henley?"

"It was before the colonel pricked him."

"By what rule do you judge of insolence of language when you do not remember the words?"

"By the manner."

"Did Reeves throw out any reflections upon America, or the persons concerned in the cause of it?"

"He did not that I heard."

"Did you consider Reeves's saying he would fight for his king and country as part of the insolence you mention?"

"I did not; Colonel Henley in reply damned General Howe, or his king and country, and told him nobody blamed him for fighting in the cause he had engaged in."

"Did you see any resistance made, or any mark of disobedience on the part of Reeves to the colonel's orders, except his not being silent?"

"There was no other order given; Reeves made no open resistance."

"In going down to the guard-house did Colonel Henley express satisfaction at having it in his power to release the British prisoners?"

"He did."

Silas Wild, captain in the militia. I had command of the guard on the 19th of December last. Colonel Henley and Major Swasey came to the guard-house and inquired what number of prisoners I had in custody, and ordered them paraded; they were accordingly drawn up in a single line, Reeves was on the right, and Buchanan next to him. The colonel mildly asked the prisoners why they would get into difficulties? I handed the charges against them to Major Swasey, and as he read over their names

and offences, the colonel spoke to each one upon the subject of his confinement. When he came to Reeves, he observed to him that he was the lad who abused the officer down in town. Reeves said he did not know him to be an officer at the time. Major Swasey told him that if he had been the officer, he should have taken his satisfaction on the spot. Colonel Henley then told Reeves he was a rascal; Reeves replied, "I am no rascal, but a true Briton, and by God I will stand up for my king and country till I die." The colonel told him that he was a good fellow to stand up for his king and country, that he did not blame him, but he must be silent. Reeves kept on talking; the colonel ordered silence, and turned to Buchanan. The major went on to read his crime, and Buchanan was making an excuse for his conduct; Reeves continued talking and swearing, and turned round to Buchanan and said, "Damn you, why don't you stand up for your king and country?" Buchanan desired him to be quiet; Reeves answered, "God damn them all, I'll stand up for my king and country while I have life; if I had my arms I would soon be with General Howe, and be revenged on them." Upon this, Colonel Henley got from his horse, and took a gun from one of the guard with a fixed bayonet, and brought it up towards Reeves's breast, and made a push at him, and said, "You rascal, if you don't hold your tongue, I will run the bayonet through you." Reeves stepped one foot back, and said he would stand up for his king and country, and if you have a mind to kill me you may. The colonel brought up the piece again, and

Reeves repeating the same words, the colonel exclaimed, "God damn your king and country, if you do not hold your tongue, I will run you through the body." Buchanan then took hold of the musket, and Colonel Henley bid him keep his distance. Finding Reeves was not to be quieted, I desired the colonel to recommit him, and he was remanded to the guard-house. After he was in the guard-house, he looked out of the window, and kept talking and swearing while Colonel Henley was addressing the other prisoners.

"Do you suppose Colonel Henley, in the pass he made at Reeves, intended to wound or only to silence him?"

"Only to silence him. The colonel spake very mildly till Reeves said, 'God damn them all.'"

"Did Colonel Henley dismiss the rest of the prisoners with a mild reproof?"

"He did."

"Did Colonel Henley do all he could to satisfy the prisoners before he dismissed them?"

"Yes; he mildly cautioned them, and told Buchanan he would release him after he had wrote to the inhabitant who had been abused."

"If Reeves had not stepped back do you think the bayonet would have gone into his body?"

"I do not think it would."

General Burgoyne. Is it usual, in the American service, to silence men by the sword and bayonet?"

"No, it is not; but when the temper is raised a man will do that which at another time he would not."

"Did you hear Colonel Henley order any of the guard to run Reeves through the body, before he got from his horse?"

"I did not hear him; he might possibly have ordered it, but I was very near to him."

Several other witnesses were examined as to the occurrence at the guard-house, and they represented the language and conduct of Reeves as most grossly indecent and insulting to Colonel Henley. It also appeared that Reeves was then in confinement for using language to a continental officer, of such an indecent character, that only one witness ventured to repeat it. The next occurrences upon which the testimony was offered, were those at Prospect Hill, on the 7th and 8th of January.[1]

Colonel Gerish, of the militia. On the evening of January 7th, a messenger came to me at Winter Hill, where my regiment is posted, and acquainted me that a sentry had been knocked down on his post, and his gun taken from him. In consequence of this report, I ordered the regiment out, and detached two hundred men, with two captains, as a reinforcement to the guard at the French lines on Prospect Hill, with orders to march silently and surround the first row of barracks, where I supposed the gun was carried in. I accompanied the detachment. The party was in two divisions, one under Captain Huse, the other under Captain Kimball. I left the party under Captain Huse in front of the first row of

[1] The precise order in which the witnesses testified is not followed in the text, but the testimony is arranged according to the time of the events related, in order to give a clearer idea of the facts.

barracks, and then Captain Kimball (who had mistaken my first orders, and got to a wrong situation,) to join Captain Huse; while Captain Kimball marched to make the junction, I was left a little behind in front of the second row of barracks. A British soldier came out and said to me, "Damn you, what do you come here for, we have done you no hurt in these barracks; we have got arms and we will shoot you." I then thought the sentry's gun might be in that barrack, and called for a sergeant and a dozen men; they came up, then the British soldiers came to the door of the barrack and presented a weapon out, (I thought it had been a musket, though I afterwards found it had only been a club,) and said, "God damn you, we'll shoot ye." I then ordered my small party to fire upon them, but upon the party's cocking, I re-called the order, as the British soldiers in the room might not all be guilty, and some of my own men might be endangered, who were in the rear of the barrack. We then approached close to the door, and found that they were not guns which the soldiers in the room had in their hands. One of them, as we approached, made a stroke at us with a stick, but did not hit either of us; as he was making another pass I struck him down, and we entered the barrack, and took five or six of those in the room, and sent them off to the main guard. I then got a candle and searched the room, found no arms, but a number of hickory sticks, shorter and stouter than walking sticks. When the search was over, one of the British soldiers catched at the candle and put it out, and followed us to the other barrack, where he

was insolent and saucy, and I thought proper to send him to the guard-house. I then gave orders to the British soldiers that they should not leave the barracks till the barracks were searched, telling them they should not be molested by my men. I then searched the barracks where I supposed the gun was carried in. They were loth the barracks should be searched, and refused giving me any direct answers; they were insolent and kept damning of us. Several of them called us damned rebels and yankees several times; this gave me strong reasons of suspicion that the gun was secreted among them, and I therefore thought proper to send the greater part of those in that room to the main guard. I then went on, and searched several rooms in the same row of barracks, and met with no opposition or insult. Finding the search fruitless, I returned with my detachment to Winter Hill, except a party I left to reinforce the guard at the French lines.

Colonel Henley. Did you receive any orders from me whatever, that evening?

"No; I made report of the transaction to you next morning."

General Burgoyne. Were you distinguished from the men by any mark that could designate you to be an officer of rank?

"I had on a blanket-coat, and sword slung over it, with a firelock in my hand, and it was dark."

Colonel Eleazer Brooks. On the morning of January 8th, I made a report to Colonel Henley, to the best of my remembrance in the following words: "Sir, before I make my report as an officer of the

day, (yesterday) I thought it my duty to inform you that one of your sentries was last night knocked down, and his gun taken from him; that Colonel Gerish, in attempting to recover the gun, was resisted with clubs, &c. That about twenty of the British soldiers were confined for this affair. I am this moment informed that two of our men were killed last night; whether it be true or not, I can't say."

Colonel Henley. Had you orders to get your regiment under arms?

"The regiment were, I believe, got under arms immediately, and soon after dismissed; but I was not with them."

Captain Caleb Brooks. On the 8th of January I was the captain of the guard on Prospect Hill, and had in custody twenty-nine British soldiers. About 11 o'clock, Colonel Henley and Major Swasey came up to the guard-house, and after some inquiries, and my reporting that everything was very quiet, Colonel Henley told me that a reinforcement was coming up, and he thought it would be best to take the prisoners out of the guard-house, and send them to Cambridge, where an inquiry could best be made into their crimes. We went into the guard-house together, and presently the detachment came into the citadel, and formed about four rods from the guard-house. At this time I saw a large number of British soldiers collecting near a corner of the guard-house. I went, with Colonel Henley's orders, to bid them disperse and retire to their barracks; he ordered them two or three times; finding they would not obey him, he called twelve men from the detachment. After some

time the twelve men moved from the party, upon which the British soldiers gave a shout and dispersed, going off towards their barracks. Immediately on this, a man came up and told Colonel Henley that a prisoner had been rescued from him by the British soldiers. Colonel Henley on this said he would take the command himself; and then marched the detachment out of the citadel, and paraded them in the rear of the barracks in the fort. I know of no transactions while the detachment were in the fort, for as captain of the main guard I could not quit my post at such a time.

"What was the number of British soldiers who were assembled near the corner of the guard house?"

"I believe near three hundred, and more were collecting when they dispersed."

"Was there any insult offered to Colonel Henley by the British soldiers?"

"Not personally to Colonel Henley; but they were laughing and jeering at the guard; some of them cried out 'Yankees,' but I can't be particular in their expressions."

General Burgoyne. Was there any appearance of an assault on the part of the British soldiers?

"No; they appeared to me rather with a view of insulting than assaulting the guard; they pointed at and laughed at the guard; they were talking, but I did not hear their expressions; there was a breastwork between the British soldiers and the detachment, over which they were looking at the detachment."

"Had the British soldiers any weapons in their hands?"

"Not that I saw."

Major Swasey. On the morning of the 8th of January I was accompanying Colonel Henley to Prospect Hill. At the bridge on the road to Prospect Hill, the sentry was examining a pass showed him by Corporal Buchanan. Colonel Henley suspecting the pass might be forged, ordered Buchanan to show it to him; with much reluctance he gave it to Colonel Henley; the name of another man inserted in it. In consequence of this discovery, Colonel Henley ordered a file of men to take charge of him. As there had been frequent rescues before, Colonel Henley ordered the guard, in case any British soldiers should attempt to rescue him out of their hands, to fire upon them. I then went on with Colonel Henley to the guard-house on Prospect Hill. Soon after we got upon the hill, a detachment, which had been ordered up to take charge of some prisoners in the main guard, arrived; after the detachment had paraded near the guard-house, a large body of British soldiers appeared near the breast-work, who were ordered to their barrack by an officer, and then by Colonel Henley; they appeared to move slowly off. At this time I stepped up to the breast-work, and observed Buchanan coming up with the guard; the guard had got into a crowd of British soldiers, and I observed a British soldier hold of the skirts of the coat of one of the guard, and heard some amongst the crowd cry out, "Run, damn you, run," and saw Buchanan running

through the crowd of the British soldiers; one of the guard pursuing him with a charged bayonet, was intercepted by the crowd, and I saw no more of Buchanan. Immediately on this Colonel Henley ordered the whole of the detachment to march out of the fort, and we went out of the fort together, and Colonel Henley asked me what measures he should take to recover Buchanan? I observed to him the best way would be to acquaint the British commanding officer of the day of it, and did not doubt he would give Buchanan up. Colonel Henley then desired me to wait on the commanding officer, and acquaint him with the matter. I accordingly waited on Major Foster, of the twenty-first regiment, and on acquainting him with the matter, the major told me he would send for the adjutant of the regiment and order him confined, and report the matter to the brigadier. In six or seven minutes I returned to Colonel Henley, and reported Major Foster's answer, with which he seemed perfectly satisfied.

"What number of British soldiers were assembled at the time Buchanan was rescued?"

"I imagine one hundred and fifty, within a circle of one hundred yards."

James Hartwell. I was at the guard-house on Prospect Hill, on the forenoon of the 8th of January, when Colonel Henley and Major Swasey rode up, and soon after a detachment came up and were paraded near the guard-house; at this time a number of British soldiers made their appearance outside the breast-work, near the guard-house; orders were repeatedly given to them by the captain of the guard

and by Colonel Henley to disperse, which they paid little regard to. There were about one hundred at the breast-work, and more were coming up; at this time I saw two or three of our men armed, coming through the British soldiers. Colonel Henley called out for a dozen men, upon which the British soldiers gave a shout and moved towards the barracks, and on their way rushed between the two or three armed men before mentioned, and there was a scuffle among them as they cleared away. I suppose a British soldier, by his clapping his hand near his hip, was wounded. Colonel Henley soon marched out with the detachment, and paraded them in the rear of the barracks; I followed and stood in the rear of the guard near the centre. As soon as the detachment halted, the British soldiers gathered round in front and rear of the detachment, to the amount of upwards of two hundred. On this Colonel Henley ordered twelve men on the right to prime and load, and then wheeled them to the left so as to form an angle. Colonel Henley then turned towards the British soldiers, and said that he had had one prisoner rescued, and if they offered to rescue any more, he would order his guard to fire upon them. Colonel Henley asked for Major Swasey, and seeing Colonel Gerish on horseback, he stepped up to him; two or three British soldiers followed him, and stood at two or three yards distance, listening (to appearance) to what was said by Colonel Henley and Colonel Gerish. Colonel Henley then ordered a division from the left of the detachment to go into the citadel and bring out some prisoners; they marched off

accordingly, and were about one fourth of the whole detachment. Colonel Henley then disposed his men to receive the prisoners which might be brought; by this time the British soldiers had collected in such numbers, that the colonel had hardly room to pass in front of his guard. Colonel Henley then addressed the British soldiers, and ordered them to disperse and go to their barracks. Some few turned round; Colonel Henley repeated his orders, and said, "Begone to your barracks, every one of you;" some others then turned round and moved slowly. Colonel Henley, on their moving slowly, cried, "God damn you, why don't you move," and made a lunge with his sword at a British soldier, which I imagine struck him, as I observed the sword was bent, and saw the colonel endeavor to straighten it. They then moved off, and the men returned from the guard-house with the British prisoners, and the whole detachment marched off the hill with them.

"Did you hear any British soldier say anything to Colonel Henley, during any of the time you have spoken of?"

"I did not; there was a buzzing amongst them, but I can't repeat any expression they used."

"Had any of the British soldiers any weapons in their hands?"

"Not that I saw."

"Did you observe any circumstance to prevent Colonel Henley from taking any of the British soldiers prisoners, had he thought proper?"

"He might have taken the man prisoner whom he struck at with the sword."

"Might he not have taken any other man prisoner?"

"He might have taken a single man; it might have been dangerous taking more."

"Was the man Colonel Henley made the lunge at moving off at the time?"

"I think he was not; he stood with his face towards the guard, at the distance of a yard or two."

"What did Colonel Henley do after making the lunge you have mentioned?"

"He turned round and walked in the front of his guard towards the right, and spoke to a British soldier, who was walking very slowly in front of the guard, and bid him go along immediately; he repeated the order; the soldier did not in the least quicken his pace; Colonel Henley followed him a little way, and then turned round; the British soldier attempted to pass the sergeant, who stood on the right of the guard; the sergeant pushed him off the bank."

"Did you see Colonel Henley make a pass at this last soldier you have mentioned?"

"I did not."

"Did you hear him make use of any other words besides what you have related?"

"I do not recollect any other."

Asa Peirce, of the militia. On the 8th of January, in the forenoon, orders came to the sergeant of our guard, to furnish a file of men and a corporal to take charge of a British soldier, of which I was one; we took him at the bridge, just below the provision

house. Colonel Henley, when we took charge of the prisoner, was by, and gave us orders if any man attempted to rescue him to fire upon them. We marched on with him (his name was Buchanan); he told us he had done nothing more than having a pass that was not his own, that he should not be punished, and that one of us would be sufficient to guard him. Just as we got within the works behind the barracks, where there was a considerable number of British soldiers collected, a British soldier came up to us upon the run; I told him to keep off; he muttered something, and told me if I did not mind he would take my firelock from me. Our corporal told him if he did not mind how he talked he would take care of him. On this he stepped aside, and walked along with us, talking with Buchanan upon the subject of his confinement; as we went along we came up to a crowd of British soldiers, I should think three or four hundred of them; our corporal ordered them to make way, which they refused to do, and stood so thick together that we could hardly tell which the prisoner was. The prisoner stepped out and another British soldier stepped in, took hold of Buchanan's arm, and placed himself between me and Buchanan, who went off with the crowd; our corporal turning round and seeing Buchanan gone, stepped in among the British soldiers to recover Buchanan. The same British soldier who had taken hold of Buchanan's arm, took hold of the corporal and stopped him; upon this I brought my piece down and pricked the soldier who had hold of the corporal, between the hip and the ribs. The soldier then let go the corporal's arm, and

we marched on to the main guard without our prisoner.

"Did the British soldiers refuse, by words or actions, to make way for the guard to pass?"

"By actions; I mean they did not move out of the way; they talked, but I don't recollect what they said."

"After Buchanan had escaped from the guard, did the British soldiers show any marks of triumph?"

"Yes; they laughed and huzzaed a good deal."

"Do you know the name of the person whom you pricked?"

"I do not."

"Do you think you run the British soldier into the body?"

"I imagine I did, for I pushed with a good will, and he cried out, 'God damn you.'"

Other witnesses were introduced to show that the American sentries had been frequently knocked down on their posts by the prisoners; and soldiers who were arrested were frequently rescued. It also appeared that it was common for the British soldiers to use every possible term of insult towards the American soldiers while on duty, and sometimes even to the officers. On one occasion an American lieutenant made known to the British officers the circumstances of an insult and rescue, of a very aggravated character. The guilty party was afterwards tried by a British regimental court martial, and sentenced to receive fifty lashes; but the sentence was remitted, and the man set at liberty, and no satisfaction was given to the American officer who had made complaint. The

standing orders from Colonel Henley to the main guard, (dated December 23, 1778,) were as follows. "The guards are to be vigilant and alert, and do their utmost to prevent disorder, and keep peace, ever attentive to the security of the camp. No officer or soldier shall be allowed to stroll from the guards. No offence to be given to any officer or soldier of General Burgoyne's army, nor is any to be received from them by the officers and soldiers of the United States of America; but they are to take up and confine any that offer the least abuse, and report them to the commanding officer. The officer commanding the guard will give orders to the sentries, that they are to defend barracks, fences, and all property whatsoever belonging to the army, or to any of the inhabitants of the United States. When any insurrection of the the prisoners shall appear to be of consequence, the commanding officer at Cambridge, is to have due notice thereof."

The evidence on the part of the prisoner being all in, General Burgoyne examined two witnesses to invalidate some of the testimony in the defence, respecting Corporal Reeves. He then produced three officers of the British army, to show that prosecutors had been admitted, assistant to the judge advocate. Captain England, of the grenadiers, stated "on his honor," that in the month of August, 1774, he was member of a general court martial, at New York, whereof the late Brigadier General Nesbitt was president, that Captain Adye, of the royal artillery was judge advocate to the court martial; that the Rev. Mr. Newburgh, chaplain to the eighteenth regiment,

was tried by the court martial for various offences, and prosecuted by Captain Chapman, of the same regiment, and in the name of the regiment; that after the witnesses against and for the prisoner were examined, the prisoner made a defence, to which Captain Chapman, the prosecutor, made a reply, in which he commented and remarked upon the prisoner's evidence and defence, having being allowed a certain time to prepare his reply. Captain Willoe, of the king's regiment, stated on his honor, that Lieutenant Molesworth, of the fifty-second regiment, was tried by a general court martial, of which he was a member, at Quebec, in the year 1769. After the prisoner had made his defence, Lieutenant Williamson, who prosecuted, replied and remarked upon the evidence produced by Mr. Molesworth. Lieutenant Bibby, of the twenty-fourth regiment, stated on his honor, that in the trial of Captain Garsten, of the seventeenth dragoons, in Dublin, in the year 1771, Major Birch appeared as prosecutor, and it being objected at first by the prisoner, that the prosecutor should have the assistance of counsel, it was the opinion of the court, that both the prisoner and prosecutor should, if they thought proper, have counsel to prompt and assist them, but not to plead; the judge advocate upon this trial was an attorney; Major Birch, acted through the whole course of trial, as prosecutor.

Tudor, judge advocate, upon this point addressed the court as follows:

Mr. President, and Gentlemen of the Court:

This, in common with all courts of record, un-

doubtedly has power to direct its own proceeding, subject to the articles of war. I do not ground my objection on anything in those articles, prohibitory of the claim I oppose, but on the customs which prevail in the American army and the supposed duty of the judge advocate. Those articles constitute a judge advocate, who, although enjoined to prosecute in behalf of the government, hath always been considered in our armies bound to assist the prisoner, not only in points of law, but by an impartial representation of facts. The whole evidence in the trial is taken in writing, subject to the inspection of the court. You cannot, therefore, gentlemen, be deceived by sophistry, or misled by rhetoric. Pleadings for this reason are unnecessary, except on a point of law, for which the judge advocate is presumed to be competent; and unbiased by the tenure of his office.

I do not oppose these precedents because they are British; had they been from Portugal or Turkey, and been pertinent and reasonable, they ought to influence your determination; although the instance mentioned by Lieutenant Bibby, is rather against the general, considered in the latitude to which he aims to extend his claim. The articles of war which govern the British army, are extracted from the Roman code of civil law; and ours are nearly the same with those adopted by the British mutiny act.

The trials by courts martial are designed to be simple, speedy, and decisive. The soldier's duty is clearly prescribed, and the punishment for neglect of it plainly ascertained, by the articles which give juris-

diction to the court that are to inquire into and punish delinquency. The judge advocate acts in the double capacity of prosecutor and counsel to the prisoner, which, those who are acquainted with the proceedings of military courts, will allow not to be inconsistent duties. The office of judge advocate has been considered by some in an army, the same as that of attorney general in the courts of criminal jurisdiction at common law, but I can safely appeal to your decision, gentlemen, if I am wrong as to the duty of that officer in our army, as I have laid it down.

The altercations of the bar in the courts of common law, arise from a combination of rights in free society, which are unknown in an army. A man when he commences a soldier, makes a temporary relinquishment of the privileges of a citizen. If a prosecutor, (and in this case a very able one) is admitted in addition to the judge advocate, surely it would be unreasonable to deny counsel in defence of the prisoner — and then consider, gentlemen, what would be the consequence. Every man brought before a court martial would be entitled to the same indulgence. All the subtleties and delays which prevail at common law would be introduced into courts martial, infinitely to the public disservice, under the circumstances which armies, *durante bello* especially, ought to be maintained and governed. I submit my objection to the opinion of the court.

The court was ordered to be cleared, and after debate, were of opinion, that General Burgoyne

should have the liberty of remarking upon the evidence offered by Colonel Henley, and the judge advocate was directed to acquaint the general with this determination.

The court then adjourned four days, and at the the next meeting, Colonel Henley being called upon to close his defence, replied as follows:

Mr. President, and Gentlemen of the Court:

I have particular reasons, and in my own apprehension very sufficient, for declining to say a single word in answer to the illiberal abuse thrown upon me, and the palpable dishonor done to my country, by General Burgoyne, in this court. It is, Mr. President, a new thing under the sun, and taken in all its circumstances, totally without example. The judge advocate will sum up the evidence with ability and impartiality. Such is my consciousness of having done nothing through this whole affair, but what the honor and safety of my country absolutely required, that I shall rest entirely satisfied with your decision; being at the same time fully persuaded, that the impartial public, at whose bar I stand, will join with you in acquitting me from all the injurious and illiberal charges of General Burgoyne, and that they will vindicate me for that humanity, characteristic of an American officer, and with which the officers and soldiers of General Burgoyne's late army have been treated, while I was honored with the command of the guards.

The court having decided that General Burgoyne

might reply to Colonel Henley's defence, he addressed them as follows: [1]

Mr. President, and Gentlemen of the Court:

On the day of your last adjournment, the judge advocate notified to me, that the court had agreed I should reply to Colonel Henley's defence, but had directed that the reply should be made immediately after the colonel closed: he added, that all interested are to attend and come prepared.

I did not judge, from the manner in which the court have treated me hitherto, that in any instance they meant me uncandidly. I therefore suppose, that when they made it a point I should come prepared to answer, off hand, arguments which might have been a month in framing, they saw the evidence before them in so strong a view, that no argument, on my part, could be necessary. Did I want further confidence in this opinion, I could not fail of deriving it, in a most ample degree, from the conduct of the prisoner, who has been just now constrained, by his situation, to substitute invective for argument, and to recriminate, where it was impossible to defend. Under the sanction of the court, and the circumstances of the time, this *candid* gentleman has ventured to make use of terms to which my ears have not been accustomed; but he is mistaken if he thinks to draw from me an intemperate reply: on the contrary, as conductor of this prosecution, I have rather to thank him for his assistance. After having furnished me,

[1] This address of General Burgoyne's is taken from Anburey's letters. In the printed trial no part of it is given, and it is stated that "no notes were taken of this speech."

during the whole course of what is called his defence, with evidence to corroborate the facts alleged against him, he at last steps forth a volunteer witness (the most undeniable one sure that ever came before a court) to prove the heat of his own temper, which is of itself a material part of his accusation. This remark is the only return I shall at present address to the prisoner, for the expressions he has used; but I cannot quit the subject, without seriously appealing to the recollection of the court, whether, from the outset, I did not, in the most positive terms, disavow all personal resentment, and whether the strongest language which the course of my duty, as prosecutor, led me to use, did not invariably arise from the facts, and apply to the offence more than to the offender. I make the same appeal against the accusation of "having done palpable dishonor to the country in this court." Is it to do palpable dishonor to a country to appeal to the justice of it? It puzzles my intellects to conceive the meaning of this last expression; but indeed, sir, I want no other vindication than your silence, to prove that I have not abused the latitude I possessed in either case; for would you, Mr. President, or any member of the court, have suffered a prosecutor to insult an unhappy man, under trial, with illiberal abuse? Still less would you have suffered the country to be treated opprobriously. It is for Colonel Henley to reconcile with his respect to the court, charges, which if founded, would be a general reflection upon their conduct.

I understand great expectation has been raised of a very elaborate defence on the part of Colonel Hen-

ley, and acknowledge I myself little thought he would throw up his cause quite so confessedly, though I was always sure, that neither ingenuity nor sophistry, nor all the talents which the ablest counsel could assist him with, would be sufficient to affect the great leading proposition upon which I ground myself, as upon an immovable rock, namely that the proofs on the part of the prosecution do not only remain unimpeached, but are augmented and enforced in the most material parts, by the evidence produced in the defence.

Gentlemen, a very few observations will suffice to justify this assertion. The first part of the charge which the prisoner brings evidence to oppose, is that concerning Corporal Reeves, on the 19th of December, and the first evidence is Major Swasey, an officer of rank and trust in your army, warm in the present unhappy contest, and naturally impressed with inclinations to favor his countryman, his brother officer and friend. Yet, with all these circumstances to bias (such is the force of truth and honor upon that gentleman's mind) he proves to be the strongest witness of the whole trial, on the side of the prosecution.

The beginning of this gentleman's relation is a confirmation of all the leading circumstances mentioned by the other witnesses. The first new matter of evidence is, that when he, the major, told Reeves he was a rascal, the corporal made a reply to him (not to Colonel Henley) he was no more a rascal than he was, at which he raised his whip, and told him, if he did not hold his impertinence, he would strike him. One circumstance of this part of the evidence

cannot pass observation, namely that the poor corporal had two aggressors to answer instead of one. The word, and the menaces attending that word *rascal*, came to his ears on both sides. Another circumstance is equally observable, and it stands upon your proceedings, as a record of honor to Major Swasey, that his warmth of temper was moved at the recital of Reeves's offence, to give a sharp rebuke, and to use an opprobrious expression, but the idea of chastisement went no further than a stroke with a riding-whip. Happy had it been for the prisoner had he followed so temperate an example.

The major's narrative proceeds in respect to Colonel Henley's dismounting, catching the firelock and stabbing Reeves, in conformity to all the witnesses for the prosecution, except that the circumstance of ordering one of the guard to run the corporal through is omitted, and his recollection being called to that circumstance, by a question in the cross-examination, he replies, "he did not hear him" (but with a candor and tenderness to his oath which never departs from him) he adds, "he might have given such an order and I not hear it."

The foregoing evidence, therefore, is not shaken by any contradiction, but it is immediately after augmented by an entire new circumstance, namely, that after the first thrust, upon Reeves's still talking to Colonel Henley, he stepped back, and made a motion to cock the firelock, and added, he would blow his brains out, or words to that effect, when a British soldier took hold of the firelock and threw it up. I request the court to take notice, that Major Swasey,

uncalled upon by any leading question, remembers that act which saved Reeves from a second thrust, accompanied perhaps with fire. Can any doubt be now entertained of Colonel Henley's resolution? I think I have proof they were obvious to Major Swasey, at the time, by the very remarkable part of the evidence, "I then got off my horse," (a conduct worthy his character, expressive of his apprehensions and his humanity) "and begged Colonel Henley to send Reeves to the guard-house." The other petitioners joined their intercession, and the man's life at last was saved.

It may perhaps be objected to this argument, that Major Swasey, upon being asked, in the cross-examination, whether he thought Colonel Henley made a thrust with an intent to injure or to silence the corporal, answers, to silence him; for if he had pushed his arm forward, he would have run him through. And in another place he makes use of the words, "to still him."

I scorn to insinuate, that a witness of the major's description meant to keep a salvo upon his mind, and purposely to use any term of ambiguity. I upon my honor believe, that when the major makes use of the words, to silence or to still, he means to terrify him till he held his tongue; but I beg leave to observe, that great difference might be made in the major's opinion, between the time the act was committed, and the time his sentiments are asked in court. The conversation with Colonel Henley, the belief of his other friends, and the candor of his own heart now persuaded him, that the colonel's intents were innocent.

His own interference and intercession mark his doubts, at least at the time, and did they not, the court will hold themselves bound to act upon their own opinion, formed upon combination and comparison of circumstances, and not upon the opinion of another, which is no evidence. They will also recollect, that this opinion goes only to the first stab, and is formed upon its not being forcible. It does not appear that the major formed any opinion, nor indeed could he, upon what force would have been the second stab of a man rising in a passion, had it not been prevented by seizing the bayonet and his intercession.

It is not necessary to trouble the court with a review of any other parts of this upright evidence, which is long. The answers to the cross questions in general go to a full confirmation of the narrative, with this one addition and aggravation of Colonel Henley's conduct, that the major thinks the language of Reeves was addressed more to himself than the colonel, till after the stab.

Captain Wild, of the militia, is the next witness, and confirms the excuse of Reeves, and every other circumstance in the beginning of the affair, as stated by the former witnesses, and by Major Swasey, except the small difference that Colonel Henley, not Major Swasey, first made use of the word rascal. He mentions afterwards another new circumstance, that the prior witness had forgot, namely, Reeves turning to Buchanan, and damning him, saying, "why don't you stand up for your king and country." Buchanan desired him to be still. Reeves replied,

"God damn them all, I'll stand up for my king and country while I have life; if I had arms and ammunition I would soon be with General Howe and be revenged." He afterwards relates, in a very circumstantial manner, making the push at Reeves; Reeves stepped back one foot, but the bayonet pricked him; and the lifting up the piece a second time, and Buchanan seizing it and turning it aside.

Upon the cross-questioning, the witness gives nearly the same answers as Major Swasey, upon the matter of opinion of Colonel Henley's intention, and of not hearing Colonel Henley order a man of the guard to run Reeves through, before he dismounted, but repeating the first, the manner in which this gentleman expresses himself is remarkable: "I believe you only meant to silence him, as you spoke mildly, till Reeves said, 'God damn them all.'" That Captain Wild thought the colonel was in a passion afterwards, is clear from his answer to the question, whether it is a rule in the continental service, to silence men by the bayonet or sword; when he replied, "it is not, but when a man's temper is raised, he is apt to do things he would not at other times."

I cannot quit this evidence, without classing it with Major Swasey's, and while it does honor to the witness, in point of truth and candor, it is to be remarked, that it is also exceedingly circumstantial, new and leading circumstances are remembered, none forgot, except the order to the guard, and the court will see, by-and-by, why I so solicit their attention to these remarks.

The witnesses that follow are indeed of a very dif-

ferent sort; the court will recollect the appearance of the first, Corporal Dean; he told his story very fluently, with that remarkable new incident of provocation in Corporal Reeves, who, he swears positively, said to Colonel Henley, "if I am a rascal, you are a damned rascal;" but after all this fluency and recollection, upon his cross-questioning, neither encouragement, nor admonition, nor patience, nor leading question, could draw an answer that any man could understand; and particularly the court will remember his silence and his countenance, when pressed to declare his sentiments upon the obligation of an oath; I will not be so uncandid as positively to pronounce upon guilt from appearance, but it is the great value of parol evidence, that a court may see the manner, and thence form a judgment upon the credibility of a witness. From what probable cause did the confusion of this man arise? It was not the awe of the court; and it is fair to suppose it is a weakness of understanding; consequently he was a fit subject to be tutored, and if not wilfully perjured, led into a belief of more than he actually saw and heard.

He is followed by a string of the best-instructed young men that ever related a story in public — Elijah Horton, Silas Moss, James Brazer, Wedsworth Horton, and John Beny, most of them lads of sixteen years of age.

I need not recall to the court the precision of the recital of these youths, nor the manner of their delivery. It was the exact tone and repetition of a fable at school, and so well was the lesson got by heart, that there was not a single difference in the arrange-

ment, and scarce a syllable misplaced. But it is not only in the similitude of memory these youths are extraordinary, they are equally remarkable in the precision of their forgetfulness, with a recollection so acute, as to repeat verbatim a long story of Corporal Reeves, and the marked expression *damned rascal* to Colonel Henley; not one syllable was heard by any British witness, nor by those attentive, circumstantial, respectable witnesses Major Swasey and Captain Wild; not one of the whole five can remember a word or circumstance respecting the colonel's damning Reeves's king and country, attempting a second pass, and being prevented by Buchanan's seizing the firelock; to all of which all the other witnesses have positively sworn. Upon the whole, I contend, that no contradiction of witnesses could invalidate their testimony more than such an exact conformity in circumstances, sentences and words, when it was for the purpose of five persons to recollect the same story, and an equal conformity in the want of recollection in circumstances, that must indispensably have been as manifest to their observation, as to that of any other witness.

I owe an apology to the court for having dwelt upon the invalidation of these witnesses longer than was necessary; for the weakness of their instructer, whoever he has been, has counteracted his wickedness, and it would do no harm to this prosecution, to give a full scope to their testimony, because there is no maxim in law more clearly laid down, and more generally understood, than that no affront by words or gestures only is a sufficient provocation, so as to

excuse or extenuate such acts of violence as manifestly endanger the life of another.

The next matter to which the witnesses in defence have gone, is the stabbing of Traggot on the 8th of January, and there likewise their testimony has served to aggravate, instead of contradicting the charge. Sergeant Kettle, in particular, expressly says, he thought the soldiers deserved stabbing, as they would not get out of the way; and in another place, that laughing and sneering as it were (which he acknowledges was the only provocation) was sufficient to justify stabbing.

I shall give the court no trouble upon the evidence brought to prove the provocation of a rescue; the escape of Buchanan was not heard without a smile in court, nor can it be seriously commented on, except in the answer of Asa Pierce, a lad of sixteen, to the judge advocate, who asked him whether he thought he run the British soldier into the body: "I believe I did," says he, triumphantly, "I pushed as hard as I could, and with a good will; he cried out 'God damn you.'" This is but one of several instances that might be selected from these proceedings, to show the degree of rancor to which the minds of the American soldiers were excited. Children that had scarcely lost the taste of their mother's milk, acquired a thirst for blood, among those from whom they took the example; the colonel thinks a man deserves death if he looks sulky; the sergeant thinks the same if he smiles. Good God! What is the value of a British life, at such a time, in such hands?

In a former part of these proceedings, I expressed

my desire that the judge advocate would explain to the court the established principles of law, respecting absent persons being accessories to offences which they have in any manner influenced, and almost every sentence that has fallen from the last witness upon the affair of Traggot, is a new call to press the consideration of those principles. I am persuaded the learned gentleman will not contradict me, in the few more leading propositions I shall add to those I mentioned on a former occasion: first, "any man advising, influencing, or countenancing another, be it by words, reward or example, to do mischief, is an accessory at a distance. Secondly: Though mischief is committed by different means than those proposed between instigator and perpetrator; for instance, A persuades B to poison C, he kills him by any other means, A is accessory. Thirdly: When the principal goes beyond the term of solicitation, if in the event the mischief committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be accessory.

Apply the above maxims: — Colonel Henley directs his men only to knock down any British soldier, who they think looks sulky at them (you have seen that he often thought a much greater punishment was due for such a crime as a sulky look) but we will suppose, he only orders them to knock a man down, or to prick him or still him, and a soldier fires down a common road, sticks his bayonet into one, and strikes at the brains of another with the but of his firelock, Colonel Henley is a party to the mischief, whatever it may be, and upon a continuation of the

principle laid down before, "the advice, orders or influence, are flagitious on the part of A — the events falling out beyond his original intention, are in the ordinary course of things the probable consequence of what B does under the influence, and at the instigation of A; and therefore in the justice of the law, he is answerable for them.

So much, sir, for the enormities committed under the orders, influence, encouragement and example of Colonel Henley, when he was not present; as for the rest, it is needless for me to follow the witnesses brought by the colonel through all the parts, wherein they severally and distinctly confirm the former evidence, upon the charges respecting the attempt upon Wilson in the colonel's sight, and of the stabbing Hadley with his own hands. I shall only remark one very striking circumstance, a little previous to the latter fact, which came out upon the second examination of that very honorable and sensible gentleman, Major Swasey. After Buchanan had run away, Colonel Henley (having first ordered some men to load, and put himself at the head of the whole detachment) asked Major Swasey what method he thought they should take to recover Buchanan: the major said "the best way would be to acquaint the British commanding officer on the hill, and he made no doubt but he would give him up immediately." The major went with a message from Colonel Henley to Major Foster, the British officer then commanding, who ordered the man to be sought for and confined. I state this circumstance to show, not only what was the proper and ready method of avoiding differences and ill blood in

fact, but also to show that this method was proper in the judgment of your own temperate officers. The major proceeds to say, that Colonel Henley appeared perfectly satisfied with the answer he brought from Major Foster, but it is well worthy remark, that the violent act of stabbing Hadley, was committed in the interim of Major Swasey's leaving Colonel Henley and his return.

The whole stress of the evidence upon the defence I have not remarked upon, goes to one single point, namely, to prove provocation. I have admitted that a sentry was knocked down, as I readily admit every slighter provocation alléged, and shall not give a moment's trouble to the court, in addition to what I argued and quoted in a former part of the proceedings upon this subject, from undeniable authority of law. I assume it to be undeniable, because I understand, gentlemen, that the criminal and common law of England, as well as a great part of the statute law, are, notwithstanding your present separation, in force and practice in your government, and that your articles of war are almost transcripts from ours. The maxims then, to which I have alluded, will hold equally good in martial and other judicatures.

I have only, sir, to revert to the leading proposition, and affirm that the charges are proved in the fullest manner, even by the prisoner's witnesses. It is not for me to suggest an opinion upon the nature of punishment. I scorn the idea of feeling joy from the most rigorous sentence; and the most perfect acquittal would not harm me further, than that such an example might continue the insecurity of the

troops. Inflexible and impartial justice, and rigid discipline, are the vital principles upon which a republic rises to maturity, and establishes itself in respect and fame. Should the court, upon due reflection, find these principles reconcilable with lenity in the present case, and the great tribunal of the world be of a contrary judgment this cause cannot be said to have miscarried.

As to the displeasure which this prosecution may bring upon me, I fear, in the present temper of this part of the country, it is not to be avoided. I stand in this circle, at best an unpopular, with the sanguine enemies of Britain, perhaps an obnoxious character. This situation, though disagreeable, does not make me miserable. I wrap myself in the integrity of my intentions, and can look round me with a smile. Implacable hatred is a scarce weed in every soil, and soon is overcome and lost, under the fairer and more abundant growth of cultivated humanity. To the multitude who only regard me with the transient anger that political opinions and the occurrences of the time occasion, I retain not a thought of resentment, because I know the disposition and hour will come, when steadiness of principle, that favorite characteristic in America, will recommend me amongst my worst enemies: as christians I trust they will forgive me; in spite of prejudice I know they will respect me.

But from the present resentful sentiments of this audience, should I carry my apprehension further, and suppose it possible that misapprehension or misrepresentation of my conduct, should operate upon

the supreme rulers of this country to treat me with severity, I hope I should still find myself prepared. Let suspension be added to suspension, and health and fortune, and fame, and life, become successive forfeits in this lingering war, — I shall lay at last down my devoted head with this consolatory reflection, that I have done what I ought — that I have performed to the best of my power my duty to my country, to the British troops under my charge, and to myself — and above all, it will be consolation to reflect, that however misinterpreted or abused, I have acted in all instances, and specifically in this trial, without a spark of private malice towards any individual soever. With this declaration I opened, with the same I conclude, and have only to assure the court of my acknowledgments for the patience, the attention, and the civility with which they have heard me.

On the conclusion of General Burgoyne's speech the court adjourned, and at the next session the judge advocate addressed them,[1]

Mr. President, and Gentlemen of the Court:

It remains with me to close this cause which has employed so much time, and been the subject of such public expectation. The mode of inquiry established in all trials by courts martial, necessarily renders the process tedious. This has been particularly so, and was an apology wanting, the patience exhibited by the court through the whole course of it, would atone

[1] This is taken from the reported trial. The account of it by Anburey is quite different, and apparently written out from recollection.

for the hours spent in the investigation of the subject.

This cause, gentlemen, has been rendered important rather from the distinguished rank and peculiar circumstances of the very able prosecutor, than from the real merits of it. For however it may have been insinuated that Colonel Henley was appointed commandant of the garrison at Cambridge, for the purpose of executing the bloody designs of an irritated, vindictive, and sanguinary people; I believe the public, as well as the court, will consider the prisoner as alone interested in it; and that this trial must forever stand the clearest refutation to any one hardy enough to *repeat* an assertion as injurious as it is false.

No sooner was the charge handed to General Heath, the guardian of the public military reputation in this department, than Colonel Henley was suspended from his command, and an immediate inquiry ordered into his conduct.

Yet notwithstanding this prompt, this early endeavor to discover facts, and punish if criminality should be proved, a wound has been aimed at the reputation of this country.

It has been said, gentlemen, before a respectable and crowded audience, that a general massacre of the troops of the convention was in contemplation, and Colonel Henley fixed upon as the black instrument of execution. There was not an American present at that time, I dare assert, who did not feel indignation beat in every pulse, while his heart reprobated the idea.

This charge, heightened with all the pomp of

words which attic diction and tragic eloquence could furnish; painted in those vivid, animated colors which keen feelings and lively apprehensions would supply; wanted nothing but *truth* to have answered the design proposed. And that this was wanting, you gentlemen, from the evidence now on your table, are, I presume, convinced. The world hereafter may be satisfied. If I thought General Burgoyne, when making this assertion, sincerely believed it to be true, though I should wonder at his deception, I should have a better opinion of his fairness; and while we smiled at his panic, we might pity his timidity.

Whatever particular, personal reasons for gaining popularity, or securing the affections of his army, or great political motives may have actuated the prosecutor in this business, you, gentlemen, who are to judge upon oath as well as upon honor, the two strongest ties that can bind you as men and as soldiers, will be swayed by nothing but the sacred principles of truth and justice. It is my duty to exhibit facts as they arise from the evidence, stripped of the meretricious coverings which ingenuity and rhetoric have attempted to conceal them in.

However excusable it may be in General Burgoyne to take a partial survey of the cause; by well turned periods to catch the attention, and force the admiration of listening crowds; and by a brilliancy of expression, or affected nobility of sentiment, attempt to dazzle, the more effectually to mislead the court, the judge advocate has a very different part to act; he ought to know no party, but undeviatingly to follow the road marked out by truth alone.

The difficulty of keeping the mind unbiased in this cause will strike the minds of the court. This is the trial of a gallant and meritorious officer; of a man, whose services in camp and in the field, most of you, gentlemen, have been witnesses to, and whose conduct as a citizen, previous to his commencing the soldier, was ever irreproachable. I must then depend on the candor of the court, should I err in summing up the evidence, to restore me to the path of disinterestedness. Much is due to the character of such an officer; but more to the safety of thousands, who, disarmed and in our power, are entitled by the laws of nations, of war, of humanity, and of justice, to protection and security, provided no mal-conduct on their parts, works a forfeiture of these rights. *Fiat justitia ruat cœlum.* Let us now look into the evidence; the court will adjudge the blame to fall where it ought.

It appears that Colonel Henley, on the 19th December, in consequence of orders from General Heath, visited the main guard with Major Swasey, with the design of releasing a number of British soldiers who had got into custody, for different misdemeanors. That he was calm and good-humored, and proceeded to execute his instructions in the most suitable way, that of inquiring into the respective offences of the culprits, previous to their dismission, and cautioning them against conduct which might subject them to another confinement. Reeves, in turn, being asked the cause of his commitment, with some hesitancy informed the colonel. And from his own account it appeared he had so grossly affronted

an American officer, that even the nerves of the candid, the placid Major Swasey grew irritated, and he was provoked enough to give Reeves a very resentful answer. Colonel Henley's feelings being more keen, he called Reeves a rascal; Reeves retorted the epithet; and the colonel, after repeatedly ordering silence, in order effectually to stop a very harsh altercation which had ensued, dismounted from his horse, seized a gun and fixed bayonet, and pricked Reeves in the breast. It appears, from the concurrent testimony of all the witnesses on the side of Colonel Henley, that his design was rather to silence Reeves than to wound him; rather to convince him he would be obeyed than to injure him. The extreme slightness of the wound, which from the surgeon's account was little more than a scratch, confirms this to have been the colonel's intention. It would certainly have been better to have remanded him to the guard-house. And if, gentlemen, you think the witnesses in support of the charge have told you all that really passed, you ought, at least, to think that Colonel Henley is a rash, passionate, precipitate officer; a man who considers stabbing his fellow creatures as a very venial offence. But if full credence is given to the evidence of six witnesses, the court will consider whether an officer, acting in such a character as the colonel then appeared in, so saucily and abusively replied to by a prisoner in Reeves's circumstances, is not pardonable, I do not say justifiable, in adopting such a mode of silencing impudence and repressing contempt.

It has been said that Reeves's behavior was only

firm, not insolent. British firmness often so nearly approaches insolence, that Europeans as well as Americans have been very apt to confound them. The court will recollect the pains taken, in one or two instances during this trial, to get from the British witnesses their idea of insolence. They all affected to think it impossible a Briton could look insolent. It was, they said, only looking up. But this *os sublime*, this erect countenance they boast of, leads them to looking down upon the rest of the world, though not always with impunity. Britain is feared because she is powerful. What pity it is a nation cannot be just as well as gallant. Less pride had prevented the dismemberment of her empire, had saved the blood of thousands. And real magnanimity had, ere this, arrested the hand of destruction from the heads of men, whose greatest fault, (once the glorious fault of Britons !) is the love of freedom.

The judge advocate then examined the charge against Colonel Henley, of intentional murder, and contended that there was neither law nor fact to support it. In allusion to General Burgoyne's assertion that Colonel Henley was responsible for most of the outrages that took place, the judge advocate said — "But, says General Burgoyne, Colonel Henley's conduct had a great effect on his guards. He was known to be no friend of the British soldiers; he had himself wounded one, and been violent in his menaces against them all; he thus influenced his soldiers to stab and murder whom they pleased, if they belonged to the British army; and ought therefore to be considered as an accomplice in every out-

rage which took place. If this reasoning is conclusive, by the same logic the general himself is an accessory to all the murders perpetrated by the ferocious bipeds, the savages who accompanied and disgraced his army last summer. Ought it to be said that because these *black* attendants knew that General Burgoyne did not love Americans, that therefore he would be pleased at the butchery of the nerveless old man, defenceless female, and infant prattler? Because he hated rebels, he therefore influenced the Indians to massacre that young unfortunate, the inoffending and wretched Miss McCrea!"

The judge advocate then proceeded to sum up the testimony respecting the occurrences on the 8th of January, as follows:

Mr. President, and Gentlemen of the Court:

We come now to the last and principal transaction of the 8th of January — the wounding Hadley on the parade. It will be necessary to state the circumstances anterior to this unfortunate action. You have the fullest proof, the confession of the prosecutor, that a sentinel, on the evening of the 7th, was knocked down on his post, that he was beat, disarmed, and his gun carried off. Colonel Gerish, like a true spirited officer, upon hearing of this daring outrage, determined immediately and in person to discover the British soldiers who were concerned in it. He accordingly with a party of his regiment surrounded one of the British barracks, and after some opposition searched several rooms which appeared suspicious. The conduct of a number of very obstreperous fellows, which he found in one of the rooms, strength-

ened his suspicion, and he thought proper, after being assaulted, menaced, and insulted, to send several of them to the main guard. The transactions of this evening were reported to Colonel Henley next morning with aggravation. The colonel, finding he had got so large a number of British soldiers as twenty-nine, prisoners in the main guard, which was situated so near the barracks of the British army, that some difficulty might arise, adjudged it most prudent to remove all the prisoners up to the town, where a proper inquiry could be made; the culpable punished, and the innocent dismissed. A detachment of one hundred men were ordered to the main guard for this purpose, and the colonel with the town major set out for the hill, to see that the detachment did their duty. On his way down, he met Buchanan playing off upon a sentinel the evasive trick which had now become common with the British soldiers, that of escaping from their barracks under counterfeit or borrowed passes. The colonel gave the orders (respecting Buchanan) we have before read, and proceeded on for the main guard; not with the most agreeable feelings, if we suppose the irritation which a variety of offensive reports and provoking considerations must have raised in his mind, during the course of the morning. Soon after he got to the main guard, the detachment marched into the citadel, and formed near the guard-house. By this time a very large body of British soldiers had assembled near the guard-house, Captain Brooks says, to the number of three hundred. The colonel, apprehensive that some disorders might arise, when the British

prisoners should be sent off with the detachment, ordered the British soldiers to disperse. Finding he was not likely to be obeyed, he called for a dozen men from the detachment, which produced a movement among them, and they were going off; when just at this time Buchanan was rescued within sight of Colonel Henley. This act of insolent triumph determined Colonel Henley to take the immediate personal command of the detachment, which he instantly marched out of the citadel upon the parade in the rear of the barracks. He had hardly time to halt his men before he was surrounded by the British soldiers, who amounted to near two hundred men, which was double his number. I rate the number on a medium between what they were said to be, by the witnesses for the prosecution, and those in behalf of Colonel Henley. Consider now, gentlemen, what must have been Colonel Henley's sensations; at the head of a party of militia, who, from being daily affronted by the British soldiers, were become their jest; that it had at length become absolutely necessary to convince these Britons that there was energy enough in their guards to force obedience and curb licentiousness; that a tumult had arisen the night before, and that an act had just taken place which was a defiance to himself: that he had not room to manœuvre his men without great difficulty, owing to the British soldiers pressing in upon the party; and that these were most of them the very men who had just before been laughing at the party, while paraded in the citadel, and who, in contempt of his orders, were again collected to keep up the laugh at the

expense of the detachment. I put it upon this footing, because I think it was apparent they were assembled rather to insult than to assail the party; though they were so near, that it was only stretching out their arms, and it would have been easy to disarm the detachment by a sudden movement; especially after the colonel had detached a quarter of his whole party to bring out the prisoners from the guard-house. Under these circumstances, gentlemen, and still more so if he was apprehensive of an attempt to disarm his men, how extremely difficult must it have been for the colonel to have checked his resentment, or stopped the hand which had been so repeatedly and insolently defied. The colonel had told them he had lost a prisoner, threatened to fire upon them, and given reiterated orders for them to disperse, before he made the lunge at Hadley. It has been proved that the British soldiers in general were slowly moving off at the time, but not that Hadley was one of them. If you are convinced, gentlemen, that he was going off, you will then consider how far the colonel's impetuosity is reprehensible, and punish him accordingly.

It appears clearly that the British soldiers had no weapons of any kind in their hands, that they made no attempt on the guard nor struck any of them, from which it may be a question, whether, had Hadley died of the wound he received from Colonel Henley, the colonel would not have been guilty of murder, because, upon the principles of municipal law, words alone, however impudent or provoking, will not reduce murder to manslaughter, though a

very slight blow first given by the person killed might have made the killing manslaughter, or even a less species of homicide.

If the nice distinctions of common law are to be made the rules of conduct in military discipline, and the regulation of a garrison, Colonel Henley must suffer. But I imagine, gentlemen, you will hardly admit this to be true. Because soldiers and citizens are entitled to very different privileges. In an army, the disobedience of an order is sometimes punished with instant death, and such an action justified and applauded, which, was it to take place among citizens, might subject a man to a halter.

Colonel Henley had stood for some time, first in the citadel, and afterwards on the parade at the head of a detachment armed, and heard the provoking epithets of "yankee" and "rebel" very liberally thrown out against his guards, by the Scotch and British loyalists who surrounded him. The word *yankee*, when used by these proficients in abuse, is intended to convey the idea of clownishness and cowardice. And to call a man *yankee rebel*, is considered by them as the strongest term of invective. Where is the officer, in such circumstances, who could suppress his indignation upon such an occasion? If, gentlemen, you should be satisfied that Hadley, at the time he was wounded, was moving off, you will consider whether Colonel Henley is not very blameworthy for making a violent lunge into a man's body, who was obeying his orders and getting out of his way — should you be convinced that Hadley was not removing, though such peremptory and repeated orders

were given him with his comrades to retire to their barracks, your opinion will be different.

Mr. Bibby swears that on the morning of the 8th January, as he passed over the parade where the detachment was drawn up, he heard an officer, whom he took to be the captain of the guard, "damn his men for inattention, and ordering them to run any man through who came near them." This speech appears to have been made soon after the wounding of Hadley, while the passions were in a tumult, and the pulse beating high from what had passed. The order was rash and unjustifiable, and the court will consider whether the example just set by Colonel Henley, in stabbing Hadley, did not occasion it, and how far he is accountable for encouraging sentiments of such a nature.

The instance mentioned by Colonel Lind, of the sentry's firing on three camp women, cannot by any means affect Colonel Henley, because it does not appear that he ever gave such orders, nor was any report made of it to him. For surely it would be unreasonable to make the commandant of such a garrison as this, where the guards are made up of a young and inexperienced militia, unskilled in military science or duty, accountable for all the mistakes and violence of such soldiers. Had a complaint been made to him of this action, and he had refused taking notice of it, it would undoubtedly have been such an avowal of it, as to have made him responsible for all the consequences of it.

The expressions and violent menaces which Fleming and Wilson swear they heard Colonel Henley

throw out at the adjutant general's office on the 16th December, carry with them, *prima facie*, very strong marks of malice, and a heart boiling with the most vindictive and turbulent passions. But the court will recollect that the colonel had that morning a report of Mason and Crane being knocked down and disarmed, while one of them was on his post. They were both much beaten. It does not appear what led to the conversation, but Colonel Henley was relating the affair to some officer in the office, when the sergeant came up and met with the salute, which has been laid before the court. The greeting was rough to be sure, but might not the meaning only be, that the devil had got into their barracks and possessed the occupiers of them, and that he should turn exorcist some night or other, turn the barracks inside out, and expel him from their territory. But I mean not, gentlemen, to palliate this matter, the words are before you. You are the judges, and will determine how far the sentiments expressed were malicious, and afterwards, as such, acted from by the colonel.

I will not take up any of the court's time by remarks on the evidence of the different rescues that took place from the beginning of December to the 8th of January, except of that sworn to by Lieutenant Stearns. This officer, after being insulted in the grossest manner by words and gesture; after having the fellow who gave it rescued in his sight; and after complaining, through tenderness, to the man's own officers; proving the complicated charge against him; to be then trifled with by a promise of a proper punishment being inflicted on the aggressor, and after all

to have the fellow set at liberty unpunished; proves the necessity of exercising the right set up by General Heath, of punishing the offenders of the convention troops, who could thus commit enormities with impunity, and shows in how contemptible a light the officers of the guards were held by the British army, and the expediency of convincing them that there was spirit enough to resent injuries, and energy enough to chastise offenders.

I shall now submit the cause, gentlemen, to your decision. Many observations have been omitted, which might have been pertinent, but which have doubtless occurred to the minds of the court, particularly with respect to the characters and contradictions of the witnesses. And I doubt not your judgment will vindicate the justice of our country, and be approved by the honest and impartial wherever it shall be known.

Upon the conclusion of these remarks, the court was ordered to be cleared, and, upon mature consideration, decided that the charge against Colonel Henley was not supported, and that he be discharged from arrest. General Heath approved this decision, and ordered Colonel Henley to reassume his command at Cambridge immediately. In the general orders announcing this result, the following statement appeared. "The General thinks it to be his duty, on this occasion, to observe, that although the conduct of Lieutenant General Burgoyne, (as prosecutor against Colonel Henley) in the course of the foregoing trial, in his several speeches and pleas, may be

warranted by some like precedents in British court martials, yet as it is altogether novel in the proceedings of any general court martial in the army of the United States of America, whose rules and articles of war direct, that the judge advocate general shall prosecute, in the name of the United States, and as different practice tends to render courts martial both tedious and expensive, he does protest against this instance being drawn into precedent in future."

Such was the result of this exciting trial, the justice and propriety of which must be judged of by the military code. In a moral point of view, although the principal charges were entirely unsupported by the testimony, there is surely room to doubt whether the conduct of Colonel Henley was not, on some of the occasions referred to in the proof, "unbecoming a man." It seems to have been the opinion of the judge advocate, that some of his proceedings were not entirely correct; and the decision of the court rather resembles the dubious character of a Scotch verdict of "not proven," than the emphatic determination of "not guilty."

The acquittal of Colonel Henley was the occasion of bitter complaint on the part of the convention troops; but it was received with great satisfaction by the continental army. Indeed, an able writer in the Boston Gazette, while the court was in session, complained vehemently, that it was ever ordered, contending that prisoners of war had no right to demand such tribunals, and that it was unnecessary for Colonel Henley's honor that one should have been insti-

tuted. There was much complaint also, that General Burgoyne was permitted to act the part of a prosecutor. It must be admitted that great latitude was allowed the British commander, in this respect. He had no right to expect any extraordinary favor from the Americans. His proclamation, at the beginning of the campaign, was still fresh in their recollection; and it could not be forgotten that he was responsible for some of the greatest atrocities that occurred during the war. It is quite apparent that his principal object in this trial was to obtain popularity with his army, and assistance in the unfortunate predicament in which the capture of that army had placed him at home. He accordingly exerted all his talents on this occasion, and conducted the prosecution with extraordinary ability. But his addresses to the court were not calculated to render him more popular to the American people; and a cotemporary writer, after denouncing the "ill-judged clemency of the American general, who, at the arrogant demands of the British prisoner, calls a court martial," is indignant that the court should have suffered "the once potent general, with his forty other titles — the grand parliamentary debater, now sunk to the pitiful pettifogger — to vilify the superior character of this brave young officer, and brand him with the coarse Billingsgate epithets of hangman, murderer and assassin." General Burgoyne was also referred to as the "British general who gave orders to his brother savages to destroy the valuable lives of innocent, defenceless women and children."

The Americans, in the immediate vicinity of this

trial, were the more sensitive on this subject, as the dignified bearing, the pungent wit, and well-turned periods of General Burgoyne, were in striking contrast with the plain and homely, not to say coarse appearance of Colonel Henley.[1] And the judge advocate was no fair match as a skilful debater, for the British general, although his speech never seems to have received his own revision, like that of his opponent, and is not a fair test of his real merits.[2]

The difficulties between the American commanders and the British troops became more serious after this trial than they had been previously; but these

[1] Stephen Codman Esq., of Boston, who attended this trial, informs me that the appearance of General Burgoyne throughout, was impressive and dignified. He was attended by his principal officers in uniform. Colonel Henley was a native of Charlestown, and was bred to the mercantile profession. At the commencement of the revolution he resided in Virginia, and was personally known to General Washington. After his trial he left the command in Cambridge, and before the termination of the war he retired from the army, and established himself in Boston, in business with the father of the Hon. Harrison Gray Otis.

[2] William Tudor was born in Boston, March, 1750. He was graduated at Harvard University, in 1769, and studied law with John Adams, and established himself in Boston. In 1775 he was elected judge advocate general, and held the office until 1778, when he resumed the practice of his profession. Among those who read law in his office, were the late Chief Justice Parker, Judge Minot, Fisher Ames, and Josiah Quincy. On the death of his father, in 1796, Mr. Tudor retired from the profession, and went to Europe. In London, he was presented at court. On mention of his name, the king exclaimed, "*Tudor!* What one of us?" The interview continued so long that the lord in waiting growing impatient, said, "His majesty seems to be so deeply engaged with *his cousin*, that he forgets what a number of persons are in waiting to be presented." Mr. Tudor held various officers of trust and honor in his native state. He married, in 1778, Miss Delia Jarvis, and had eight children. The eldest married Robert Hollowell Gardiner, Esq., of Gardiner, Maine, and the youngest, Commodore Charles Stewart, of the United States Navy. Mr. Tudor died in 1819.

belong to the general history of the time, and are not appropriate to our present purpose. Meanwhile General Burgoyne obtained leave to return to England before his troops, and left the scenes of his defeat and disgrace with enfeebled health and a heavy heart, for he had little to expect from the ministry, in whom he had excited the hope of brilliant success on assuming his command in America. He has been described as of a noble figure and commanding mien, "an elegant writer, a good speaker, an amiable and accomplished gentleman, and a gallant officer. Devoutly attached to his country; ambitious, but ambitious of distinction in the service of his sovereign." He held a respectable rank among the writers of that day, having composed and published three dramas of considerable merit. On his return home he was coldly received by the ministry, and was neglected by the court. Upon his repeated and earnest solicitation, an inquiry was instituted by parliament into his conduct on the expedition. It was however broken off by the prorogation of parliament, and was never resumed. After his return he became a member of the house of commons, where he annoyed the ministers by the ability and zeal of his opposition, and they ordered him back to America. Of course he refused to obey, and resigned his commission. He died in 1792.

PROCEEDINGS

OF

A BOARD OF GENERAL OFFICERS,

HELD BY

ORDER OF GENERAL GEORGE WASHINGTON,

RESPECTING

MAJOR JOHN ANDRÉ,

CHARGED WITH BEING A SPY.

NEW YORK, 1780.

The proceedings respecting Major André hardly come within the legitimate province of the present work, and might very properly be omitted, especially as the whole subject is so well described in Mr. Sparks's admirable life of Benedict Arnold. But a brief account of these proceedings seems necessary in order to a proper understanding of the trial of Joshua H. Smith, which immediately follows, and which is not so generally known. In addition to the work of Mr. Sparks, and the histories of the revolution, I have examined the proceedings of the court of inquiry, which were printed by order of congress, and the narrative of Joshua H. Smith, which was published in England many years after the events which it purports to describe. The portrait of André, at the beginning of this volume, is taken from an engraving in Smith's narrative. The military journal of Lieutenant Colonel Simcoe, recently published, has some interesting facts in relation to this subject, but nothing that is remarkably new.

MAJOR JOHN ANDRÉ.

In the year 1780, at the most critical period of the American revolution, a plan was formed by Benedict Arnold, a major general of the American army, to deliver into the hands of Sir Henry Clinton, the British commander in New York, the important fortress of West Point, on the Hudson River, of which Arnold was at that time in the command. The causes of this extraordinary proceeding on the part of an officer, who stood deservedly high in the estimation of his countrymen for his valuable services during the war, are to be found in his character and personal history; to which, however, it is not necessary to allude with much particularity in this connection. Naturally vain and passionate, Arnold had become a soured and discontented man, and he deliberately resolved to commit an act of treason, which he expected to result in the most brilliant success to himself, and by which he hoped to have ample revenge for real or fancied wrongs.

Under the influence of these feelings, General Arnold at length made a direct proposal to the British commander, to surrender the important post which had been entrusted to his command by Washington. To gain an object of so much importance, Sir Henry Clinton could not hesitate to accede to any terms, however exorbitant; and he devoted himself with great zeal to obtain this fortress by a stratagem of war, which he could never hope to take by open attack. It was obviously necessary for all parties, that the negotiations should be conducted with the utmost secrecy, and with sound discretion. The person in the British army to whom the commander principally confided this delicate matter, was Major John André, a man of refined manners, of a highly cultivated mind, and of the strictest integrity.

André was originally destined for mercantile pursuits, and had been several years in the counting-room of a respectable establishment in London, when he formed an ardent attachment for a young lady, which was reciprocated; but the marriage was defeated by the opposition of the lady's father, and she was subsequently married to another person. From that moment André became disgusted with his pursuits, and resolved to seek relief from his bitter associations, and dissipate the memory of his sorrows, in the turmoil and dangers of war. He joined the British Army in Canada, with a lieutenant's commission, and was taken prisoner at the capture of St. John's by General Montgomery, in the autumn of 1775. He was sent with other prisoners to Lancaster, in Pennsylvania, where he remained a few months

till he was exchanged. Not long afterwards he said, in a letter to a friend, "I have been taken prisoner by the Americans, and stripped of everything except the picture of Honora, which I concealed in my mouth. Preserving that, I yet think myself fortunate." The picture had been delineated from the living features of the object of his affection, by his own hand.

To a graceful and handsome person, Andre added many accomplishments of mind and manners. He was passionately fond of the fine arts, and had attained very considerable skill in drawing and painting. A journal of his travels and campaigns in America, which he kept from the time of his first arrival in Canada, contained lively and picturesque sketches of the people, their dresses, houses, and other objects, illustrating the habits of life, customs, and amusements of the Canadians, Americans, and Indians; and also drawings of animals, birds, insects, trees, and plants, each in its appropriate colors. Landscapes, views, and plans of places were interspersed, and connected by a narrative and written descriptions. This journal was seen and perused in Philadelphia, while the British had possession of that city. To a taste for poetry he united a love of elegant letters, and his attainments in the various branches of literature were extensive. His epistolary writings, so far as specimens of them have been preserved, show a delicacy of sentiment, a playfulness of imagination, and an ease of style, which could proceed only from native refinement and a high degree of culture.

These attractions, connected with an affable deportment, and the address of a perfect gentleman, gained him ready access to all circles, and won the hearts of numerous friends. A favorite in the army, and everywhere admired in the walks of social life, his merits were soon discovered by those, who had power to reward them. Unaided by any other recommendation, than that of his own character, he was received into the military family of Major General Grey as aid-de-camp, soon after his release from captivity. In this station he remained till General Grey returned to Europe, when he was transferred to the same post in the family of Sir Henry Clinton.

Such was the confidence and the respect for his talents, which he inspired in Sir Henry Clinton, that, when a vacancy occurred in the office of adjutant general, by the resignation of Lord Rawdon, he appointed André to fill the place at the head of the department. André was now only a captain in the service, and, the rank of major being requisite for an adjutant general, Sir Henry Clinton wrote to the minister on the subject, and requested that he might accordingly be promoted. The minister declined complying with the solicitation, on the ground that André was too young an officer for such an elevation, In reply, General Clinton intimated surprise and a little displeasure, that his request should be thus turned aside; and said he could not fix his choice on any other person so suitable for the office, and therefore he should continue to employ André to discharge its duties, and should forbear for the present to make any other appointment.

This representation was successful. The rank of major was conferred on André, and Sir Henry Clinton then applied in form to have him commissioned by the king, as adjutant general of the army in America. The letter containing his application was dated only three weeks preceding the capture of André. Hence he did not receive the commission before his death, although he had for nearly a year filled the office of adjutant general.[1]

Such was the officer whom Sir Henry Clinton, at the solicitation of Arnold, had requested to undertake the mission of meeting with him, for the purpose of arranging specifically the terms upon which he was to consummate his treachery. The dangers and difficulties of the undertaking were fully appreciated on both sides, and various expedients were proposed and partially acted upon, but without success. Meanwhile the British commander had sent the Vulture, sloop of war, up the Hudson River, as far as Teller's Point, in order to facilitate an interview with the American commander. A boat was sent on board by Arnold in the night, and André came on shore in his uniform, which was concealed by a cloak. An interview then took place between the two officers, but the business could not be completed, and it was thought best for André to accompany Arnold to the house of Joshua H. Smith, which had been procured for the purpose, and which was within the American lines. Here, on the following day, the arrangements were concluded, although the details have never come

[1] Sparks's American Biography, 171, 174.

to light. André was supplied with certain papers explanatory of the military situation of West Point, which, by Arnold's advice, he placed between his stockings and feet, and was then ready to return to New York. His own desire was to be carried again on board the Vulture; but for some reason, which has never been satisfactorily explained, Joshua H. Smith, in whose house André was staying, and who had assisted in bringing him ashore, obstinately refused to return again on board the Vulture.[1] André submitted to the necessity of his situation, and prepared to return to New York by land. He was prevailed upon to exchange his military coat for a citizen's dress, and, with a passport from Arnold, he set out on his dangerous route, under the assumed name of John Anderson.

He had passed over a considerable portion of what was then called the "neutral ground," without any serious interruption, and as he approached the point where all danger would be at an end, there was a marked alteration in his appearance. The weight which had rested upon his spirits seemed removed; he became animated and even cheerful, and when Smith at length left him to return home, he proceeded on his journey, with the feeling that the great object

[1] The reason which Smith gives in his narrative is, that he was attacked severely with the ague, and could not suffer an exposure in the boat. But this could hardly have been the true reason, as he did, in fact, accompany André several miles on horseback. Smith's conduct and his real motives have always been shrouded in mystery. He was unfortunate enough to incur the contempt of both parties. He was obliged to flee this country, and in England his condition was not much improved. See the Political Magazine, for February, 1781. Smith's Narrative, *passim*. Sparks, 211.

of his dangerous mission was about to be accomplished. But his hopes were destined to a disappointment as disastrous as it was unexpected, and the well-concerted scheme was utterly defeated in a manner as singular and interesting, as it was creditable to all who were concerned in its discovery.

By a law of the state of New York, at that time in force, any person was authorized to seize and convert to his own use, all cattle or beef that should be driven or removed from the country in the direction of the city, (which was then in possession of the British,) beyond a certain line in Westchester county. By military custom, also, the personal effects of prisoners, taken by small parties, were assigned to the captors as a prize. It happened that, at the very time André was returning to New York, three persons were concealed in the bushes, watching the road to intercept any suspicious stragglers or droves of cattle, that might be seen passing to that city. The names of these men were John Paulding, David Williams, and Isaac Van Wart. On seeing André, who appeared to be a stranger, they stopped him, when almost the first words he spoke revealed a part of his secret. "Gentlemen," he said, "I hope you belong to our party." "What party?" "The lower party." André then most incautiously added, "I am a British officer, out of the country on particular business, and I hope you will not detain me a minute." The suspicions of his captors being confirmed by this avowal, he was ordered to dismount; he then exhibited to them General Arnold's pass; but as he had called himself a British officer, they determined to search

him, and on finding the papers concealed in his stockings, they refused to let him proceed. The unfortunate officer was reduced to despair by this unexpected misfortune, and offered his captors any sum of money to let him proceed on his way; but finding them resolved to do otherwise, he resumed the natural dignity of his deportment; he begged of them to ask him no questions, and said that when he came to any commander, he would reveal all.

On arriving at the nearest military post, his papers were transmitted to General Washington, and it being evident that any farther attempts at concealment would be useless, he subsequently wrote the following letter to the commander in chief of the American army.

"Salem, 24th September, 1780.

"Sir, — What I have as yet said concerning myself was in the justifiable attempt to be extricated; I am too little accustomed to duplicity to have succeeded. I beg your Excellency will be persuaded, that no alteration in the temper of my mind, or apprehension for my safety, induces me to take the step of addressing you; but that it is to rescue myself from an imputation of having assumed a mean character for treacherous purposes or self-interest; a conduct incompatible with the principles that actuate me, as well as with my condition in life. It is to vindicate my fame that I speak, and not to solicit security. The person in your possession is Major John André, adjutant general to the British army. The influence of one commander in the army of his adversary is an advantage taken in war. A corres-

pondence for this purpose I held; as confidential (in the present instance) with his Excellency, Sir Henry Clinton. To favor it, I agreed to meet upon ground not within the posts of either army a person, who was to give me intelligence; I came up in the Vulture man-of-war for this effect, and was fetched by a boat from the ship to the beach. Being there, I was told that the approach of day would prevent my return, and that I must be concealed until the next night. I was in my regimentals, and had fairly risked my person. Against my stipulation, my intention, and without my knowledge beforehand, I was conducted within one of your posts. Your Excellency may conceive my sensation on this occasion, and will imagine how much more must I have been affected by a refusal to reconduct me back the next night as I had been brought. Thus become a prisoner, I had to concert my escape. I quitted my uniform, and was passed another way in the night, without the American posts, to neutral ground, and informed I was beyond all armed parties and left to press for New York. I was taken at Tarrytown by some volunteers. Thus, as I have had the honor to relate, was I betrayed (being adjutant general of the British army) into the vile condition of an enemy in disguise within your posts. Having avowed myself a British officer, I have nothing to reveal but what relates to myself, which is true on the honor of an officer and a gentleman. The request I have to make to your Excellency, and I am conscious I address myself well, is, that in any rigor policy may dictate, a decency of conduct towards me may mark, that, though unfor-

tunate, I am branded with nothing dishonorable, as no motive could be mine but the service of my king, and as I was involuntarily an impostor. Another request is, that I may be permitted to write an open letter to Sir Henry Clinton, and another to a friend for clothes and linen. I take the liberty to mention the condition of some gentlemen at Charleston, who, being either on parole or under protection, were engaged in a conspiracy against us. Though their situation is not similar, they are objects who may be set in exchange for me, or are persons whom the treatment I receive might affect. It is no less, sir, in a confidence of the generosity of your mind, than on account of your superior station, that I have chosen to importune you with this letter. I have the honor to be, with great respect, sir, your Excellency's most obedient and most humble servant."

The astonishment produced throughout the whole country, and especially in the American army, by the discovery of the astounding treachery of an officer high in command, was only equalled by the feelings of indignation with which his conduct was regarded. But notwithstanding the detestation in which the traitor was universally held, the accomplished young officer, who had fallen into the hands of his enemies, was regarded with the greatest sympathy; a feeling very much strengthened by his noble and manly bearing, under the trying circumstances in which he was placed, and his determination to meet his fate, whatever it might be, with the simplicity of truth as well as with the courage of a soldier.

The first effort of Washington was to secure the traitor, but having failed in this, by the escape of Arnold to the British man-of-war, his next care was to guard in every way from the possible effects of the meditated treason, especially by ascertaining, with all possible delicacy and caution, whether the disaffection had extended to any other officers of the army. He then turned his attention to Major André himself, and determined to take such energetic and efficient measures in respect to that officer, as the laws of war and the emergencies of the case seemed to justify and require. He summoned a board of general officers, directing them to examine into the case of Major André, to report a precise state of the same, and to give their opinion, as to the light in which he ought to be regarded, and the punishment that should be inflicted. The board consisted of six major generals and eight brigadiers, as follows :[1]

Major General Greene, *President ;* Major Generals Lord Stirling, St. Clair, the Marquis de la Fayette, Howe, the Baron de Steuben ; Brigadier Generals Parsons, Clinton, Knox, Glover, Patterson, Hand, Huntington, Starke. John Lawrence was the judge advocate general.

The board having assembled in the meeting-house, at Tappan, in the state of New York, on 29th September, 1780, Major André was brought before them, and the following letter from General Washington was read :

[1] The reader will observe, that the board was not a court martial, but merely a court of inquiry, instructed to examine and report facts, and to express an opinion.

"GENTLEMEN, — Major André, adjutant general to the British army, will be brought before you for your examination. He came within our lines in the night, on an interview with Major General Arnold, and in an assumed character; and was taken within our lines, in a disguised habit, with a pass under a feigned name, and with the enclosed papers concealed upon him. After a careful examination, you will be pleased, as speedily as possible, to report a precise state of his case, together with your opinion of the light in which he ought to be considered, and the punishment that ought to be inflicted. The judge advocate will attend to assist in the examination, who has sundry other papers, relative to this matter, which he will lay before the board. I have the honor to be, gentlemen, your most obedient and humble servant."

The names of the officers composing the board were then read to Major André, and the president of the board informed him that various questions would be asked, but that the board desired him to feel at perfect liberty to answer them or not, as he might choose, and to take his own time for recollection and weighing what he said. On his being asked whether he confessed the matters contained in the letter from General Washington to the board, or denied them, he stated that his letter to General Washington contained the truth, and the letter was then read to the board (ante, page 164). He also gave a brief narrative of what occurred between the time of his coming on shore and that of his capture, to the effect, that he came on shore from the Vulture sloop of war in

the night of the 21st of September instant, somewhere under the Haverstraw mountain. That the boat he came on shore in carried no flag, and that he had on a surtout coat over his regimentals, and that he wore his surtout coat when he was taken. That he met General Arnold on the shore, and had an interview with him there. He also said that when he left the Vulture sloop of war, it was understood he was to return that night; but it was then doubted, and if he could not return he was promised to be concealed on shore in a place of safety, until the next night, when he was to return in the same manner he came on shore; and when the next day came he was solicitous to get back, and made inquiries in the course of the day, how he should return, when he was informed he could not return that way, and he must take the route he did afterwards. That the first notice he had of his being within any of the American posts, was, being challenged by the sentry, which was the first night he was on shore. He also said, that the evening of the 22d of September instant, he passed King's ferry between our posts of Stony and Verplank's points, in the dress he is at present in and which he said was not his regimentals, and which dress he procured after he landed from the Vulture, and when he was within the American post, and that he was proceeding to New York, but was taken on his way, at Tarrytown, as he mentioned in his letter, on Saturday, the 23d of September instant, about nine o'clock in the morning. He also confessed that certain papers, which were shown to

him, were the same that had been concealed in his boots, and that a pass for John Anderson, in the handwriting of Arnold, was the one he had exhibited to his captors. Being interrogated as to his conception of the manner in which he came on shore, and whether he considered himself under a flag, he answered, that "it was impossible for him to suppose he came on shore under the sanction of a flag, and added, that, if he came on shore under that sanction, he might certainly have returned under it." Throughout his examination Major André maintained a manly, dignified, and respectful deportment, replied to every question promptly, discovered no embarrassment, sought no disguise, stated with frankness and truth everything that related to himself, and used no words to explain, palliate, or defend any part of his conduct. So delicate was he in regard to other persons, that he scrupulously avoided mentioning names, or alluding to any particulars except such as concerned himself. General Greene spoke of Smith's house, in reference to the place of meeting between André and Arnold. "I said a house, sir," replied André, "but I did not say whose house." "True," answered Greene, "nor have we any right to demand this of you, after the conditions we have allowed." The examination being closed, Major André was asked whether he had any remarks to make on the statements that had been presented. He replied in the negative, and said he should leave them to operate with the board. He was then remanded to the place of his confinement.

After a full consideration of the subject, the board

made the following report, which was signed by every member:

"The board having considered the letter from his excellency General Washington, respecting Major André, adjutant general to the British army, the confession of Major André, and the papers produced to them, report to his excellency, the commander-in-chief, the following facts, which appear to them relative to Major André. First, That he came on shore from the Vulture sloop of war in the night of the 21st of September instant, on an interview with General Arnold, in a private and secret manner. Secondly, That he changed his dress within our lines, and under a feigned name, and in a disguised habit, passed our works at Stony and Verplank's points, the evening of the 22d of September instant, and was taken the morning of the 23d of September instant, at Tarrytown, in a disguised habit, being then on his way to New York, and when taken, he had in his possession several papers, which contained intelligence for the enemy. The board having maturely considered these facts, do also report to his excellency General Washington, that Major André, adjutant general to the British army, ought to be considered as a spy from the enemy, and that agreeable to the law and usage of nations, it is their opinion he ought to suffer death.

"Nath. Greene, M. Gen., President; Stirling, M. G.; Ar. St. Clair, M. G.; La Fayette, M. G.; R. Howe, M. G.; Stuben, M. G.; Samuel H. Parsons, B. Gen.; James Clinton, B. Gen.; H. Knox, Brig. Gen., Artillery; Jno. Glover, B. Gen.; John Pat-

terson, B. Gen.; Edward Hand, B. Gen.; T. Huntington, B. Gen.; John Starke, B. Gen.; John Lawrence, J. A. Gen."

These proceedings respecting Major André excited the deepest feeling throughout both armies. The final decision rested with Washington, and notwithstanding the equity of the sentence pronounced by the board of officers, yet there were so many extenuating circumstances connected with the manner in which André had been seduced into the snare, that a hope was entertained by many even in the American army, that he might be saved by the commander-in-chief from the last infliction of human power. But that great and good man was equal to the emergency, and although severely tried in his feelings, he was entirely satisfied that the extraordinary circumstances of the case required the most signal punishment, and he did not shrink from what he regarded as a public duty. There was but one possible mode of saving André, and that was to exchange him for Arnold, who had escaped to the British army. Sir Henry Clinton received, indirectly, an intimation of this, but he refused to listen to the idea for a moment. He made every possible effort, however, to save the life of a favorite officer, who was condemned to death under circumstances of such melancholy interest; and even sent a deputation with a flag of truce to the American commander, furnished with evidence to "prove Major André's innocence," and with such information as it was hoped would place the question in a different light from what it had been viewed by the American board. One of these com-

missioners was met by General Greene by the command of Washington, and he went into a long examination of the subject, contending that André could not be justly regarded as a spy, because he landed under the sanction of a flag, and acted wholly by the directions of Arnold. The substance of this conference was communicated to Washington, but it produced no change in his opinion and determination.

Meanwhile the sentence of the board of officers was communicated to Major André on the day it was given; he manifested no surprise, and exhibited, during his whole confinement, a calmness of manner and a winning gentleness of deportment that excited the love and admiration of all who saw him. "I foresee my fate," he said to Colonel Hamilton, "and though I pretend not to play the hero, or to be indifferent about life, yet I am reconciled to whatever may happen, conscious that misfortune, not guilt, has brought it upon me. There is only one thing that disturbs my tranquillity. Sir Henry Clinton has been too good to me; he has been lavish of his kindness; I am bound to him by too many obligations, and love him too well, to bear the thought that he should reproach himself, or others should reproach him, on the supposition of my having conceived myself obliged, by his instructions, to run the risk I did. I would not, for the world, leave a sting in his mind that should embitter his future days." He could scarce finish the sentence, bursting into tears, in spite of his efforts to suppress them, and with difficulty collected himself enough afterwards to add, "I wish to be permitted to assure him, I did not act under this

impression, but submitted to a necessity imposed upon me, as contrary to my own inclination, as to his orders."

His request was readily complied with, and he wrote the following letter to Sir Henry Clinton:

"Sir, — Your excellency is doubtless already apprized of the manner in which I was taken, and possibly of the serious light in which my conduct is considered, and the rigorous determination that is impending. Under these circumstances, I have obtained General Washington's permission to send you this letter; the object of which is, to remove from your breast any suspicion, that I could imagine I was bound by your excellency's orders to expose myself to what has happened. The events of coming within an enemy's posts, and of changing my dress, which led me to my present situation, were contrary to my own intentions, as they were to your orders; and the circuitous route which I took to return, was imposed (perhaps unavoidably) without alternative upon me. I am perfectly tranquil in mind, and prepared for any fate, to which an honest zeal for my king's service may have devoted me. In addressing myself to your excellency on this occasion, the force of all my obligations to you, and of the attachment and gratitude I bear you, recurs to me. With all the warmth of my heart, I give you thanks for your excellency's profuse kindness to me; and I send you the most earnest wishes for your welfare, which a faithful, affectionate and respectful attendant can frame. I have a mother and two sisters, to whom the value of my commission would be an object, as the loss of

Grenada has much affected their income. It is needless to be more explicit on this subject; I am persuaded of your excellency's goodness. I receive the greatest attention from his excellency General Washington, and from every person under whose charge I happen to be placed. I have the honor to be, with the most respectful attachment, your excellency's most obedient and most humble servant."

Of his captors, who were about to execute the martial law, he made but one request; it was his wish to die the death of a soldier, and he requested that he might be shot. "Buoyed above the terror of death," he wrote, in a touching letter to Washington, "by the consciousness of a life devoted to honorable pursuits, and stained with no action that can give me remorse, I trust that the request I make to your excellency at this serious period, and which is to soften my last moments, will not be rejected. Sympathy towards a soldier will surely induce your excellency, and a military tribunal, to adapt the mode of my death to the feelings of a man of honor. Let me hope, sir, that if aught in my character impresses you with esteem towards me, if aught in my misfortunes marks me as the victim of policy and not of resentment, I shall experience the operation of these feelings in your breast, by being informed that I am not to die on a gibbet."

It seemed almost a refinement of cruelty that this request should not be granted; but by the customs of war, a spy must suffer death in its most ignominious form, and it was the opinion of Washington and the officers he consulted, that the present case ought

to form no exception. The determination not to grant the request was not made known to the prisoner, it being deemed more humane to evade a reply, than to cause the painful sensations which a positive refusal would inflict.

Major André was executed on the 2d of October, 1780, at noon, at the Dutch village of Tappan, (Orangetown). His demeanor was such as to excite the admiration, the respect, and the sorrow of every beholder. With an easy and graceful carriage, a placid, but firm and thoughtful countenance — unnerved by fear, he met his fate; exhibiting the courage of a soldier, and the meekness of a christian. He was dressed in the rich uniform of a British staff officer, with the exception, of course, of sash, gorget, sword, and spurs. The place of execution was near the centre of the encampment of the army, and in full view of many of its regiments. The officers of the American army performing duty on horseback, with General Greene at their head, were formed in line on the road. The commander-in-chief was not present. To those whom Major André knew, particularly those who made part of the board of general officers who pronounced on his fate, he paid the salute of the hat, and received the adieus of all with ease and complacency.[1] The event is graphically described by an eye-witness, whose account of the execution presents a most vivid picture of the whole scene.

"The principal guard officer, who was constantly

[1] Letter of Major Benjamin Russell, in the New England Magazine, for May, 1834.

in the room with the prisoner, relates, that when the hour of his execution was announced to him in the morning, he received it without emotion, and while all present were affected with silent gloom, he retained a firm countenance, with calmness and composure of mind. Observing his servant enter the room in tears, he exclaimed, 'Leave me till you can show yourself more manly.' His breakfast being sent to him from the table of General Washington, which had been done every day of his confinement, he partook of it as usual, and having shaved and dressed himself, he placed his hat on the table, and cheerfully said to the guard officers, 'I am ready at any moment, gentlemen, to wait on you.' The fatal hour having arrived, a large detachment of troops was paraded, and an immense concourse of people assembled; almost all our general and field officers, excepting his excellency and his staff, were present on horseback; melancholy and gloom pervaded all ranks; the scene was affecting and awful.

"I was so near during the solemn march to the fatal spot, as to observe every movement and participate in every emotion, which the melancholy scene was calculated to produce. Major André walked from the stone house, in which he had been confined, between two of our subaltern officers, arm in arm; the eyes of the immense multitude were fixed on him, who, rising superior to the fear of death, appeared as if conscious of the dignified deportment which he displayed. He betrayed no want of fortitude, but retained a complacent smile on his countenance, and politely bowed to several gentlemen whom he knew,

which was respectfully returned. It was his earnest desire to be shot, as being the mode of death most conformable to the feelings of a military man, and he had indulged the hope that his request would be granted. At the moment, therefore, when suddenly he came in view of the gallows, he involuntarily started backward, and made a pause. 'Why this emotion, sir?' said an officer by his side. Instantly recovering his composure, he said, 'I am reconciled to my death, but I detest the mode.'

"While waiting and standing near the gallows, I observed some degree of trepidation; placing his foot on a stone, and rolling it over, and choking in his throat, as if attempting to swallow. So soon, however, as he perceived that things were in readiness, he stepped quickly into the wagon, and at this moment he appeared to shrink, but instantly elevating his head with firmness, he said, 'It will be but a momentary pang;' and taking from his pocket two white handkerchiefs, the provost marshal with one pinioned his arms, and with the other, the victim, after taking off his hat and stock, bandaged his own eyes with perfect firmness, which melted the hearts, and moistened the cheeks, not only of his servant, but of the throng of spectators. The rope being appended to the gallows, he slipped the noose over his head, and adjusted it to his neck, without the assistance of the executioner. Colonel Scammell now informed him, that he had an opportunity to speak if he desired it. He raised the handkerchief from his eyes, and said, 'I pray you to bear me witness, that I meet my fate like a brave man.' The

wagon being now removed from under him, he was suspended and instantly expired." [1]

Such, at the age of twenty-nine, was the death of this brave and accomplished officer; his fate was deplored by those who had condemned him, and whose cause he had sought to ruin. No American can read this portion of our history without deep regret that the sacrifice was deemed necessary; no Englishman, who reads it impartially, can ever assert that the whole proceedings were not conducted by the strict laws of war, or that the conduct of Washington was not in all respects worthy of himself. That Major André was a spy, his own admissions most conclusively proved; and, by the martial code, a spy must suffer death in its most ignominious form. Under the circumstances of this case, neither Major André nor his friends had any right to expect a departure from the well established rules of war. The modern reader may regret that André's last request as to the manner of his death was not granted. But Washington was ignorant of the extent of this astounding conspiracy, and he acted under the deliberate advice of his officers that the circumstances of the case would justly admit of no departure from the usual course. Nor was the conduct of the British army in similar cases such as to call for lenity here.[2] And although Sir

[1] Thacher's Military Journal, p. 222.

[2] In a conversation which André had with Major Tallmadge, soon after his capture, he wished the American officer's opinion as to his probable fate. The latter endeavored to evade the question, but when he could do so no longer, he remarked to him as follows: "I had a

Henry Clinton, in his efforts to procure the release of André, argued with great ability that he could not be properly considered as a spy, yet he made no complaint in the narrative which he sent to the British government, that his arguments had been disregarded, or that the sentence was unjust.[1] In publishing the event to the army in general orders, he maintained the same reserve, as to the mode of André's death, and made no insinuation that his death had been caused by vengeance, injustice, or any improper act of the enemy. "The unfortunate fate of this officer," he said, "calls upon the commander-in-chief to declare, that he ever considered Major André a gentleman of the highest integrity and honor, and incapable of any base action or unworthy conduct."

Upon the whole, the fate of André cannot be regarded as disgraceful to himself, or as casting any stain upon the character of Washington. Both acted in the conscientious performance of duty. But it is a remarkable commentary on the unnatural system of war, that a man so universally respected and be-

much-loved class-mate in Yale College, by the name of Nathan Hale, who entered the army in the year 1775. Immediately after the battle of Long Island, General Washington wanted information respecting the strength, position, and probable movements of the enemy. Captain Hale tendered his services, went over to Brooklyn, and was taken just as he was passing the outposts of the enemy on his return." Said Tallmadge, with emphasis, "Do you remember the sequel of this story?" "Yes," said André, "he was hanged as a spy. But you surely do not consider his case and mine alike?" Tallmadge replied, "Yes, precisely similar, and similar will be your fate."

[1] See also the remarks of Sir Samuel Romilly, on this subject, in his Memoirs, I. 140.

loved, should meet with an untimely and ignominious end for an act which no true soldier could blame him for performing. In lamenting his fate, however, it should not be forgotten that he was perfectly aware of the dangerous character of the enterprise before he engaged in it; and his reward, in case of success, was to have been proportionally great.

Major André was buried in an open field, near the spot of his execution. Forty years afterwards his remains were removed to England, and deposited in Westminster Abbey, near the monument erected to his memory by his royal master.

SACRED TO THE MEMORY

OF

MAJOR JOHN ANDRÉ,

Who, raised by his Merit, at an early Period of his Life,

TO THE RANK OF

ADJUTANT GENERAL OF THE BRITISH FORCES

IN AMERICA,

And, employed in an important but hazardous Enterprise,

FELL A SACRIFICE

TO HIS ZEAL FOR HIS KING AND COUNTRY,

On the 2d of October, 1780, aged 29,

Universally beloved and esteemed by the Army in which he served,

AND LAMENTED EVEN BY HIS FOES.

His gracious Sovereign,

KING GEORGE III.

Has caused this Monument to be erected.

TRIAL OF JOSHUA HETT SMITH

BEFORE

A COURT MARTIAL,

ON A CHARGE OF

AIDING AND ASSISTING BENEDICT ARNOLD.

NEW YORK, 1780.

The trial of Joshua H. Smith appropriately follows the foregoing account of the proceedings against Major André, as it develops many of the secret incidents of the conspiracy. The testimony in the case, which was very voluminous, was written out by the judge advocate, and was transmitted, with the other papers of the court martial, to the governor of New York. They have remained in the Clinton family ever since, never having been printed in a more permanent form than that of a newspaper. Many years after the trial, Smith published his narrative, of which the title page was as follows: "An authentic narrative of the causes which led to the death of Major André, adjutant general of his majesty's forces in North America. By Joshua Hett Smith, Esq., counsellor at law, late member of the convention of the state of New York. To which is added, a Monody on the death of Major André. By Miss Seward. London: printed for Mathews & Leigh, 18 Strand, 1808." This work is characterized by great bitterness, and although the author evidently had before him a copy of the written testimony produced to the court at his trial, he utters innumerable assertions widely different from the testimony itself, and from his original defence. It is a curious and interesting work, as exhibiting the character and opinions of the writer, but is worthy of but little credit upon matters of fact, except where the statements are confirmed by other authority.

TRIAL OF JOSHUA H. SMITH.

As soon as the treason of Benedict Arnold became known, the commander-in-chief of the American army took decisive and energetic measures to ascertain how far the defection extended, and to punish all who had been in any manner cognizant of the traitor's designs. But it was satisfactorily ascertained, that no just ground of suspicion could be entertained against any of the American officers, although the conduct of Major Varick and Major Frank, the aids-de-camp of General Arnold, was investigated by a court of inquiry, at their own request. There was one person, however, who had been loud in his professions in favor of the cause of liberty, against whom there were violent suspicions of a want of good faith in his connection with this affair. This was Joshua H. Smith, who went on board the Vulture sloop of war for André, and in whose house the unfortunate officer spent the night

and day after it was determined not to return to the ship. Indeed, André had on a suit of Smith's clothes when he was taken prisoner. But little doubt was at that time entertained, that Smith was cognizant of the whole plot, and he was arrested at Fishkill, in the night of the 25th of September, 1780, by Colonel Gouvion, a French officer, whom Washington sent for that purpose. He was conducted, under guard, to West Point, and from that place to Tappan, where he was kept in confinement till he was tried by a court martial.

Smith was by profession a counsellor at law, and was a person of substance and well connected in the province. The family had been previously suspected of disaffection. His eldest brother, afterwards the chief justice of Canada, had been banished within the British lines at New York for his unequivocal attachment to the British government, and another brother was generally deemed an enemy to the revolution. Smith himself was one of the delegates appointed from the county of Orange, to oppose, in the convention of delegates of the different counties of the province, in 1776, the measure of independence then recommended and adopted by congress. After his arrest he was brought before General Washington and some of the principal officers of the army, when his account of his knowledge of and connection with the proceedings of Arnold was so confirmed, as to give strength to the suspicions that already existed in regard to his good faith. He acknowledged that he went on board of the Vulture; and that André returned with him, and that he entertained that offi-

cer at his house, and accompanied him a part of the way towards the city of New York; but he denied emphatically that he was present at any interview between Arnold and André, or that he was in the least aware of Arnold's plans.

The court martial, ordered for the trial of Smith, assembled on September 30, 1780, the day after the examination of André, and continued by adjournment about four weeks. The members of the court were Colonel H. Jackson, *President;* Lieutenant Colonel Hait; Major Ball; Captains Jacob Wright, Drew, Frye, Sandford, Fowle, J. A. Wright, Marshall, Chase, and Tiffany. John Lawrence, *Judge advocate general.*

The judge advocate laid before the court several charges against the prisoner, and produced to them certain resolutions of congress, of the 21st August, 1776, and the 27th February, 1778, respecting the trial of inhabitants; and he desired their opinion whether they had a competent jurisdiction to try the prisoner on these charges. Smith objected to the legality or propriety of his being tried by a military tribunal. He conceived himself only amenable to the civil authority of the state, to which he belonged, which had established the right of trial by jury in the constitution then recently established. "I was answered by the court," he says in his narrative, "that I was tried by a resolve of congress, passed in the year 1777, authorizing the commander-in-chief of the army, to hear and try by court martial, any of the citizens of the United States, who should harbor or secrete any of the subjects or soldiers of the king of

Great Britain, knowing them to be such, or should be instrumental in conveying intelligence to the enemy, and, if found guilty, should be condemned and executed as a traitor, assassin and spy. To this I objected, that the resolve of congress, just alluded to, was possibly passed anterior to the adoption of the several constitutions of the United States, when there were no legal establishments, and was introduced to supply the want of civil jurisdictions in that early stage of the war; and that I could not conceive how a mere resolve of congress could abrogate a fundamental article in any of the civil constitutions of the United States; for, if so, it made the military paramount to the civil authority, and would establish, if the court were to proceed on my trial, a precedent dangerous to the liberties of the subject; that it would excite eventually the indignation of my fellow citizens, in destroying one of the established principles of liberty belonging to the subject, and the violation of the right of trial by jury, one of the principal reasons assigned by congress for their separation from Great Britain, in the declaration of independence, as well as allowing the military an extent of power incompatible with a free government."

The court, after consideration, were of opinion that they had jurisdiction under the resolution of congress of the 27th February, 1778, to try the prisoner upon one of the charges preferred against him, and as to the three others, they were of opinion that they had not jurisdiction.

The judge advocate, prosecuting in the name of the United States of America, then exhibited the

following charge against the prisoner, namely, "For aiding and assisting Benedict Arnold, late major general in our service, in a combination with the enemy to take, kill and seize such of the loyal citizens or soldiers of these United States, as were in garrison at West Point and its dependencies."

To this charge the prisoner pleaded not guilty. The judge advocate then called and examined witnesses in support of the prosecution. Their testimony was as follows:

Samuel Cahoon. On the night of the 21st of September instant, I went on board the Vulture sloop of war, belonging to the enemy, with Mr. Smith. He had been up at Fishkill, as he told me, and came down in the evening; he said he wanted to speak a word with me, and I went with him up to his room, when he asked me to go with him that night a piece down the river. I told him I did not want to go; he did not urge me hard. Then he said he must send me up express to General Arnold, and we should go over to the other house; but, upon my telling him I had no mind to go, he seemed to urge my going, and said it was great business. I then agreed to go. We went over to his brother's, where I consented to go to General Arnold's, and was furnished by Mr. Smith with a horse, and a paper to Major Keirce, and went off. I went on as fast as I could, and got to General Arnold's just before sunrise; the general was not up. I delivered the letter from Mr Smith to a gentleman there; and I was informed by the general, that there was no occasion for an an-

swer; and I was told by him I might go on as quick as I could. I returned back, and sometime in the afternoon General Arnold passed me, and rode towards Mr. Joshua H. Smith's house. (Mr. Smith, the prisoner, here acknowledged that General Arnold arrived at his house that afternoon.) Near sundown, Mr. Smith spoke to me as I was going for the cows, and told me to come up, as the general wanted to speak with me. I went up with Mr. Smith to the room where General Arnold was, who asked me to go with him a piece that night. I said I could not go, being up the night before, and told him I was afraid to go; but General Arnold urged me to go, and told me if I was a friend to my country, I should do my best. At last I asked the general where he wanted me to go, and the general and Mr. Smith said on board of the ship in the river; that there was a man there the general wanted to see very much. Upon my asking the reason why he could not stay till the morning, General Arnold said it must be done that night; and upon my saying I could not go alone, Mr. Smith desired me to go and fetch my brother. I went, and my wife being dissatisfied with my going, I went back to General Arnold, and told him I did not want to go, and told him there were guard boats out; he said there was no danger of them, and added if I did not go, he would look upon me as a disaffected man. I then went and fetched my brother; and when we came back we stood out a great while before we consented to go; but at last we did, and there being a boat in the creek, myself, Mr. Smith and my brother went to the boat, and

rowed down to the ship. During my conversation with General Arnold and Mr. Smith, Mr. Smith was in and out of the room, and I do not recollect any particular conversation passing between Mr. Smith and General Arnold separate. No other conversation passed between Mr. Smith and myself on the way down, that I recollect, but Mr. Smith telling me not to pay anything to the people on board the vessel, which was General Arnold's charge likewise. We were hailed by the vessel, and Mr. Smith answered, "friends," and said we were from King's Ferry, and bound to Dobb's Ferry; we were ordered alongside immediately. When we came alongside of the ship, Mr. Smith went on board and stayed, I think, not longer on board than a quarter of an hour; he returned on board the boat with a man. We set off from the vessel, and rowed on shore: we landed at the Long Cove, a little below Haverstraw, about half a mile below the dock, and about six miles from Stony Point. I heard no conversation between Mr. Smith and this person on the way ashore. I sat in the bow of the boat, and they in the stern, and I think if there had been any I could have heard it. When we came on shore, I heard the noise of a man at a bank above; Mr. Smith went up, and returned immediately. The person we brought on shore then went up, and Mr. Smith staid with us, and asked my brother and myself if we would go on board the vessel again that night. I told him I was fatigued, being up the night before, and could not go. All this time the other person was not present, and I do not know where he was, but suppose he was up

against the bank, as he went that way. Mr. Smith said if we could not go we must do as we thought best, and would leave it to us, but made us no offer to return on board the vessel that night.

The witness further testified, that himself and his brother then went up in the boat to Haverstraw creek, and Smith staid on the shore with them from their first landing, except when he went towards the bank and returned, as he had mentioned, until he went in the boat with them to Haverstraw creek. From thence the witness went with Smith to his house, but did not see the person there that he brought on shore from the vessel. The person they brought on shore had a dark-colored coat on, but whether black or blue, the witness did not know, as he did not take notice of it. He never carried Mr. Smith on board the vessel again; neither had he been on board before with him, and did not see General Arnold at Mr. Smith's house when he returned that night. The witness had no conversation with Mr. Smith about carrying the man they landed on board again, except the conversation that took place on the shore, as he before mentioned; and he received no reward or promise from Smith for bringing this person on shore; but testified that General Arnold had promised him fifty weight of flour, which was before he went on board with Smith. General Arnold ordered them, when they went down in the boat, to take a sheep skin with them, to put around their oars, and the witness put one around his.

Questions by Smith, the prisoner. Don't you recollect my telling you, in going down to the creek,

my intention in going was for the service of the country?

"You did tell me so."

"Did General Arnold persuade you a great deal to go; and did I appear anxious for your going?"

"He did. You did not appear anxious."

"Whose business did you suppose it to be?"

"General Arnold's and yours; but I did not know whose it was. I was urged very hard to go by the general."

By the Court. Did Mr. Smith or General Arnold tell you not to tell your brother what was wanted of him until he arrived at your house?

"Mr. Smith did."

"When you returned, did Mr. Smith tell you not to mention to anybody that you had been on board the vessel?"

"Not that I recollect."

"Did you object to going on board at first because you thought it was wrong, or because you were tired?"

"It was because I was tired, and I thought it wrong, also, to go in the night at that time of night."

Joseph Cahoon. Last Thursday night week Mr. Smith sent word to me to come over to his house. When I came there he met me at the door, and sat down on the bench with me. On asking him what was his desire, he said he wanted me to go with him that night. On asking Mr. Smith where he wanted to go, he said, a little way down the river. On asking him how far, and where, he said, I think, on board of the man-of-war, or ship — I am not certain which —

as a flag on business of General Arnold. I told him I was sorry I was wanted for that purpose, and said upon any other thing I was willing to serve him or the general. Mr. Smith asked me why, and said there was no hurt in going, as it was general business. On asking him whether he did not think we should be taken up by the water-guard, (meaning the continental water-guard) he said, no — for he had a pass from the general to go, and the countersign; and said the countersign was "congress," which, when he came up he must give, and so pass. Mr. Smith made answer to me, and said, "Have you not always heard that I was a friend to the country, and did that which was always best for the country?" I told him "yes," and always thought he was; upon which I asked him why the flag was not sent down in the day-time, as it ought to be done? He said, because it was to be kept private from the inhabitants and common men. The officers, he said, knew it, and there was a man on board that the general wanted to speak to, and he must be brought on shore and carried on board again. I then told him I did not choose to go. He said there was no hurt in going at all, and if anything should come against me, he would defend me, and clear me from all. I told him he could not clear me if there was anything bad in it. He afterwards got up and went into the house to General Arnold. General Arnold came out soon after Mr. Smith went in, and said, upon his coming out, that I need not be afraid to go with Mr. Smith, that it must be done for the good of the country, and it was not done in private, for the officers of the ferry

knew it, the captain of the water-guard also, and had the countersign, and it was not a secret to any persons but the inhabitants and common men. I thought at first it was not good, but thought otherwise upon the general's mentioning that it was known, as I have mentioned. The general also said Major Keirce had agreed to send him up a boat to the creek, at Colonel Hay's landing place, but had not done it, and he did not know the reason; upon which Mr. Smith asked me if I would take his horse and ride down to the ferry, to see whether the boat was come. I said no, he might send his negro; he ordered the negro to get the horse, and the negro went off. While the negro was gone, myself and my brother concluded not to go; but both were afraid to tell the general of it, and did not go to him, and the time passed away until the negro came. When he came, I asked him what news concerning the boat? He said he did not know, and he brought a letter from Major Keirce to the general, upon which I told my brother I would go up and tell the general. I had no mind to go; as I was going up I met Mr. Smith in the entry, and he told me the general wanted to speak with me. He passed out to the stoop, and I went into the room to the general, who was sitting by a table with paper. On his speaking to me, I acquainted him I had no mind to go, as it was late, and said I would rather go in the morning. General Arnold said he must go to head-quarters by ten o'clock in the morning, and if I would not assist when I was required for the good of my country and congress, he would put me under guard immediately. Upon which Mr. Smith came

in, and I went out, and just after this Mr. Smith came out to the stoop, asked my brother and myself if we would have a dram, and gave us each one. Afterwards the general came out, and Mr. Smith and myself and brother were there together. The general and Mr. Smith talked together, but what they said I do not know; they were withdrawn from us; the distance I cannot estimate, but it was such a distance that I could not hear what they said, as they talked low; they were no time of any value together; may be two minutes, may be more or less. My brother, Mr. Smith and myself went down to the landing, about half a mile below King's Ferry, and passed off in the boat, and I think it was pretty well near midnight when we got off. Mr. Smith had on a whitish coat, a pretty large one, which I think I have seen him wear before. Mr. Smith told us, on the way, that when we came on board the vessel, we had nothing to do but to stay on board the long boat, and when asked questions, to say nothing at all. When we came to the vessel they hailed us, and Mr. Smith answered "halloo," or some such a word, but I think it was not the word "friend," and upon being asked where we were from, Mr. Smith answered, "from King's Ferry," and were bound to Dobb's Ferry, and they ordered us to come on board immediately. When we got alongside of the ship, Mr. Smith went on board, and staid a little time, but I cannot say the exact time, it might be a quarter of an hour, or a little longer, but the exact time I cannot say; I was asked several questions by men who came on board the boat, such as where we were from, and going to,

and who he was that came on board the boat; at last orders came for every man, who was on board the boat belonging to the ship, to come out immediately. Mr. Smith, after a little time, came on board the boat, and another man came with him, who had a dark-colored coat on, which I looked upon to be a watch-coat. I thought it was a watch-coat, because it covered the whole of his clothing; then we rowed on shore at a place called the Long Clove, about six miles from Stony Point, where we landed; and Mr. Smith went up towards the bank, a little way from the water. I heard Mr. Smith and the person in the boat talk a little on the way ashore, but how much I cannot say, and I did not understand what they said. I did not see any man by the bank; Mr. Smith staid a little while there, came back, and the other man went up, whom I did not see afterwards. When Mr. Smith returned, he staid with us, and came up with my brother and myself in a boat to a place called Crom's Island, in Haverstraw creek. When we landed, I stepped out and got down under a bush. I was drowsy, and had no conversation with Mr. Smith about returning to the vessel that night, neither had I any conversation with Mr. Smith about returning to the vessel with that man afterwards, and I declare I have not seen Mr. Smith from that time until this day. General Arnold promised me fifty weight of flour for going on board the vessel, but I never saw it; Mr. Smith did not promise me anything for it. Mr. Smith, after his return, did not desire me to keep it a secret. Upon the boat coming alongside the vessel the tide was flood, and we

were all three upon our legs, keeping the boat from the side of the vessel, and one on board said, "come on board," upon which Mr. Smith went. I did not hear Mr. Smith inquire for any person upon his going on board, but lost sight of him immediately, as he was upon deck. After we got out from the ship, Mr. Smith told me to row ashore to Long Clove. He steered the boat himself. The time we arrived at the Long Clove I do not know; but it was about daybreak when we got to Crom Island, and when we got to Mr. Smith's house it was after daylight. We were not hailed on our way down, but by the ship; neither were we on our way returning. When we came to Mr. Smith's house, after our return from the ship, to the best of my knowledge I saw General Arnold come out of Mr. Smith's house and go into the necessary house. He walked lame, and had on a blue coat and white breeches. I am sure he was the same man who I saw before I went on board the vessel, who was called General Arnold, as well as I can judge from my knowledge of men. Mr. Smith gave me a sheep-skin, when I left his house, and carried it down to the boat, and he and myself muffled my oar with it, and my brother muffled the other, and after we returned to Crom's Island, Mr. Smith told us to take the sheep-skin off from the oars, and throw the oars upon the grass; one of the sheep-skins was taken off.

Colonel James Livingston.[1] I supposed there

[1] Colonel Livingston was himself, at one time, almost suspected of being acquainted with Arnold's plans. He commanded at Verplanck's Point, and from the proximity of his post to the enemy, and several

was an intimacy between Mr. Smith and Benedict Arnold, from the passes the former had from General Arnold. Mr. Smith was at my quarters two or three times, within a fortnight and three weeks ago, and previous to General Arnold's going off to the enemy. His stay was very short, and he produced me a pass from General Arnold, to pass by the guards at all times; he also had an order from General Arnold for a light boat, on the quarter-master, at King's Ferry, and General Arnold requested me to see that the quarter-master furnished him with a light boat, if there was one to be had. Mr. Smith then informed me, that he was upon a plan, in conjunction with General Arnold, to gain intelligence of the utmost importance, and that he expected to meet a gentleman for that purpose near Dobb's Ferry, but did not mention the time when he expected to meet him. He then agreed with the lieutenant of my guard-

concurring circumstances, might be very fairly presumed to have been either directly or indirectly concerned in Arnold's manœuvres. By a very laconic letter, Washington ordered that officer to come to him immediately. Livingston expected, at least, a severe scrutiny into his conduct, being fully aware, though conscious of his innocence, that circumstances were unfavorable. But Washington made no inquiries into the past, nor uttered a syllable that implied distrust. He told Colonel Livingston, that he had sent for him to give him very special orders, to impress upon him the danger of his post and the necessity of vigilance, and to communicate other particulars, which could only be done in a personal interview. In conclusion he said it was a source of gratification to him, that the post was in the hands of an officer, whose courage and devotedness to the cause of his country, afforded a pledge of a faithful and honorable discharge of duty. Let the reader imagine the grateful emotions of Colonel Livingston, his increased esteem for his commander, and the alacrity with which, under such an impulse, he went back to his station of high trust and danger. Sparks's Life of Arnold, p. 252.

boats to have a watch-word, so that the lieutenant might let him pass at any time, by day or night, by the boats, without his being detained. I neither heard nor saw anything of Mr. Smith until last Friday night week, just before dark. He stopped at my marquee for a few minutes. I asked him where he was going. He said up towards General Arnold's, or that route, and I gave him one letter to be delivered to General Arnold, and another to Governor Clinton, as he had informed me it was likely he would go that route. I then urged him to stay awhile and take supper or a drink of grog. He informed me that there was a gentleman waiting for him, who had just rode on, and was in a hurry to get off. He informed me his business was very urgent, and I did not insist on his staying any longer. He then rode off and I did not see the person who was with him, it being dark and he having rode forward.

"Do you know of Mr. Smith having made use of the guard-boat or watch-word?"

"I do not know."

"Did Mr. Smith inform you, before the time you have mentioned, that he was employed by General Arnold to get intelligence?"

"Mr. Smith never was more than two or three times at my quarters, and mentioned it the different times he was there."

"When Mr. Smith was at your quarters, and mentioned that there was a person with him, did you not desire him to request the gentleman to walk in?"

"I did, and he informed me the gentleman had rode on slowly, and he was in a hurry to go after him."

Colonel Harrison was next produced on the part of the prosecution and sworn.

Mr. Smith objected to Colonel Harrison, and also to Lieutenant Colonel Hamilton, being admitted to give evidence respecting any confession that he might have made in their presence. The court, however, upon consideration, decided that these officers should be admitted to give evidence upon this point.

Colonel Harrison.[1] I was at Robinson's house on Tuesday or Wednesday last, to the best of my recollection, and was requested by one of the gentlemen of his Excellency's family, or some officer who was there, to go into a room to hear the examination of Mr. Joshua Smith, the prisoner, who I understood had been apprehended the preceding night, and brought there by Colonel Gouvion, in consequence of orders from General Washington. When I went into the room, I found the General, the Marquis de la Fayette, General Knox, Colonel Hamilton, and Mr. Smith. In a little time after, to the best of my recollection, the general mentioned to Mr. Smith, that he must be apprized of what had happened, and told him that he thought, or advised him, I don't recollect which, that he had better make a candid confession of all he knew with respect to the matters

[1] Harrison's testimony, says Smith, in his narrative, was imperfect on the most material points, as he detailed those parts that militated against me in support of the charge, and excluded those that favored my life. p. 133.

that had been carrying on, I think by General Arnold, and added again that it might be better for him to act with openness and candor. Mr. Smith upon this made the most solemn protestations of his innocence, and of his ignorance that General Arnold had been carrying on any matters injurious to the states; professed himself to be a warm friend, and that his person and property, or his purse, I don't recollect which, had been devoted to their service. Mr. Smith continued to repeat his innocence of the matters then under consideration; and, to the best of my recollection, made an appeal to the Almighty, who, he said, could witness the integrity of his heart. After having made these asseverations, the general observed to Mr. Smith that he was in possession of facts and evidence, that would place his conduct in a very different point of view with respect to the matter in question. Till this period Mr. Smith appeared to support himself with firmness and consistency. He then proceeded to tell the general that he would relate all he knew, and on being asked to inform whether an officer, or the adjutant general of the British army, I don't recollect which, under the assumed name of John Anderson, had not been brought on shore by him from the Vulture ship of war, he said that he had. Mr. Smith said he had been prevailed on, on the night of the preceding Thursday, to go on board that vessel by General Arnold, to carry a letter or a message, I don't remember which, to Colonel Beverly Robinson, and whom he expected to bring with him when he came back in the first instance, for the purpose of an interview with General Arnold,

for intelligence or on business, I don't recollect precisely the expression, of importance to the states. That as soon as he was on board of the vessel, it was concluded that an officer, who, Mr. Smith said, he only knew by the name of John Anderson, should return with him instead of Robinson. That the interview took place at the shore between Arnold and this officer. That Arnold and the person or officer whom he had brought on shore, were at his house afterwards — the same night that he furnished this person under the assumed name of John Anderson, with a coat to disguise himself, and that he had taken the uniform coat, which he, John Anderson, had on before, and retained it. That he, Mr. Smith, crossed the ferry at Stony Point, on Friday evening, in order to conduct Mr. Anderson to the White Plains, on his way to New York, and was stopped, I think he said, to the best of my recollection, that night, at Crom pond, or near it. Mr. Smith, in the course of the examination, invariably declared that his object was to obtain intelligence for us, and assigned, upon its being observed by the general or some gentleman who was present, that the mode he had adopted appeared illy calculated for that end, as he was to procure it on board one of the enemy's ships of war, that he thought it probable Colonel Robinson might be disposed to give such as would be beneficial to us, or serviceable, from a wish to have some favor, or I think, countenance shown with respect to his estate, which was in our hands. It was observed to Mr. Smith, that supposing it possible to conceive that he was really serious in the matter with respect to Rob-

inson, that these motives could not exist in the case of Mr. Anderson, who had no property amongst us. Mr. Smith appeared much embarrassed, and answered that he could only say that Anderson was sent on shore instead of Robinson. As it appeared mysterious to the gentlemen who attended the examination, why this officer, under the name of John Anderson, was not returned on board of the ship after finishing his business, by Mr. Smith, some of the company were induced to ask the reasons. Mr. Smith replied that it was because he, meaning himself, had the fever and ague so bad that he could not go on board, though he had confessed, but a little before, that he meant to proceed with him as far as the White Plains by land, or somewhere in the county in the vicinity of that place. The examination of Mr. Smith, as well as I recollect, ended here, and he was remanded under guard. In a little time after, it was observed by some of the gentlemen, that it would be essential to gain possession of this uniform coat I have mentioned, when I was requested by the general to pursue such measures for the purpose, as appeared to be necessary. I had previously understood that Captain Cearns, of Lee's Light Horse, was at Mr. Thomas Smith's, brother of Mr. Joshua Smith, and I meant to write him an order to get the coat, in consequence of the request from the general. I wished, from motives of policy as well as humanity, to make as little noise about the matter as the case would admit, and applied to Mr. Joshua Smith, the prisoner, to know whether he himself would not give an order that Captain Cearns might get the coat.

Mr. Smith accordingly wrote a letter addressed to his brother, Thomas Smith, to deliver to Captain Cearns, of Lee's Light Horse, a uniform or regimental coat, I don't recollect which, which he would find up stairs in the drawers, at his, meaning Joshua Smith's house, and which coat, I understood, was the uniform coat which the person under the name of John Anderson had left with Mr. Smith. Mr. Smith delivered the letter to me, which I transmitted to Captain Cearns. The matter ended here, and I had no conversation with Mr. Smith afterwards. Mr. Smith did not acknowledge the officer who came on shore with him from the Vulture, under any other name that I recollect than that of Anderson.

"Did Mr. Smith mention that this person under the name of John Anderson, and General Arnold, were at his house the Thursday night after he had brought him on shore from the Vulture?"

"To the best of my knowledge he did, but whether he did mention it explicitly I will not undertake positively to say; but from the whole tenor of Mr. Smith's confession, I had not a doubt but that the person under the character of John Anderson and General Arnold, were at his house."

The Court. Did Mr. Smith mention that he lodged with the person under the name of John Anderson, at Crom pond?

"I don't recollect that he mentioned that he lodged there. I think, to the best of my knowledge, that Mr. Smith mentioned that when they were stopped at Crom pond, or when they stopped, I can't precisely charge my memory with the expressions,

"Did I assign no other reason but that of being unwell, for not returning Anderson on board the ship?"

"To the best of my knowledge you said you could not do it, as you had the fever and ague. When it was observed that it was strange that a man was in such a situation as not to be able to go a few miles by water, and could go a long journey, or a considerable distance by land, you might have added some other reasons, but if you did, I do not recollect them."

Lieutenant Colonel Alexander Hamilton.[1] I was present when Mr. Smith, the prisoner, made his confession before the gentlemen already mentioned by Colonel Harrison, which was substantially as follows: — That he had been employed by Major Generals Howe and Arnold, for the purpose of procuring intelligence from the enemy; that General Arnold informed him of an interview he was to have with Colonel Robinson, of the British army, in which he assured him he expected to derive information of importance, and wished to engage Mr. Smith to go on board the Vulture sloop of war, then lying in the North river, to bring Colonel Robinson on shore for the purpose of that interview; that he gave Mr. Smith an order for a boat to execute this commis-

[1] "General Knox and Colonel Hamilton came, in testimony, more pointed to the exact truth of what I had declared, especially the latter, whose evidence was perfectly correct, by which was anticipated what must have been otherwise extracted in cross-examination; yet Hamilton artfully threw in a chain of reasoning, tending to prove my being in full knowledge of General Arnold's intentions." Smith's Narrative, p. 133.

sion; that he went secretly and in the night on board the Vulture, to the best of my recollection, with a note from General Arnold to Colonel Robinson; that his being on board was known not only to Colonel Robinson, but to the officers of the vessel; that instead of Colonel Robinson, a person under the name of John Anderson, came on shore with him; that General Arnold and Anderson were that night and the next day at his (Mr. Smith, the prisoner's) house; that he was an absolute stranger to the business they transacted; that he was not able to return with Mr. Anderson in the same manner he had brought him to the interview, on account of his having the fever and ague; that he therefore took a different mode, and proceeded with him by King's Ferry towards the White Plains; that he left him on the road, I do not exactly recollect at what place, and returned himself; that either previous to his setting out, or in the course of the journey, he assisted Mr. Anderson to exchange the clothes he had for others, which Mr. Smith furnished, I believe he said, at the desire of General Arnold; that he understood from General Arnold, before he undertook the commission, that his (General Arnold's) hopes of procuring intelligence from Colonel Robinson were founded on Robinson's desire to make terms for the safety of his estate. Mr. Smith, in the course of his examination, asserted his innocence of the transactions between General Arnold and Mr. Anderson, with very solemn protestations and appeals to heaven. On being pressed as to the possibility of his having given this interpretation to the business he was concerned in,

from the circumstances of Colonel Robinson having come up in a king's vessel, which must necessarily have been with the privity of Sir Henry Clinton, having deputed a third person to represent him in a matter which would have been to all intents and purposes treason, the giving intelligence to an enemy, as pretended by General Arnold, and of his having been received, and a third person sent, in presence of the officers of the ship, all which denoted that the object of the interview must have had the sanction of Sir Henry Clinton, as before intimated, and consequently must have been for promoting the interests of the enemy. Mr. Smith appeared at first a good deal embarrassed, but finally replied that he acted from the perfect confidence he had in General Arnold, whose rank and services to the country would not suffer him to entertain the least suspicion of his being capable of entering into a treasonable combination with the enemy. Mr. Smith, on being questioned if the person he brought on shore was dressed in a uniform, answered that he could not perfectly distinguish whether he wore a uniform or not, but that he had on a red coat, with a blue surtout. Mr. Smith also acknowledged, in the course of his examination, to the best of my memory, that he had carried a pass on board the Vulture for John Anderson, from General Arnold. From the subsequent circumstances, this John Anderson proves to be Major André, adjutant general to the British army, who has recently suffered death.

The Court. Did Mr. Smith mention his having been on board the Vulture before he brought

this person, under the name of John Anderson, on shore?

"Not to my knowledge. I was not present at the whole of the confession."

The Prisoner. Was not my reason given for going on board of the ship in the night, and was it not that General Arnold told me he did not wish the source of his intelligence as yet to be known to everybody?

"I have a faint recollection that it was."

"Don't you recollect that I said I was very roughly used by the officers of the watch on board the ship?"

"I think I do, on your first arrival, or rather on your approach."

"How then could it be with the officers' privity that I came on board?"

"I did not suppose that the officers of the ship had a previous knowledge of your intention to come on board, but in the roughness of sea manners, gave you the kind of reception you mentioned to have met with, as you complained of no rude treatment by the other officers after you were once known, and acknowledged that they were acquainted with your communication with Colonel Robinson. By communications I mean that you came on board on business with Colonel Robinson. You acknowledged the officers of the ship were also acquainted with the person, John Anderson, having been sent on shore with you."

"Do you mean that I declared my ignorance as to General Arnold's designs, as they were then discov-

ered, or of General Arnold's intentions in sending me on board the vessel?"

"You declared your ignorance of any criminal intention whatsoever in General Arnold."

"Don't you recollect my saying that General Arnold, when he applied to me for a coat for Anderson, said he was only a merchant, and from pride had borrowed a coat from an officer in New York?"

"I do not."

"Don't you recollect my appealing to you, before the gentlemen present, at the time of the examination, with respect to my political character, as far as you knew it, and whether a charge of that kind could be laid against me, without the highest proof of my being knowing to Arnold's design?"

"I recollect you appealed to me respecting your political character, and that my answer was that in the early part of this contest, you had exhibited appearances of an intemperate zeal for the cause of America."

"What do you mean by an intemperate zeal?"

"An excessive warmth."

"Was not my character in New York always esteemed as a warm friend to the cause of America, before we quit the city, as far as came to your knowledge?"

"Many persons esteemed you as a zealot on the popular side, though intimations of doubt have been made to me of the sincerity of your pretensions, I believe from a suspicion of your family."

"Was it from any suspicions against me, or from any part of my political conduct, that you could learn?"

"Not from any part of your own political conduct."

"Do you recollect my conduct in New York on the 6th of March, 1775?"

"Not precisely on that day, but on the preceding evening I do recollect it. You then appeared active to promote the interest of the whig party, and I believe at that time you were sincere."

"Before I gave a detail to General Washington, at Robinson's house, of my transactions with General Arnold, was I not requested to do it, the general limiting me to the last ten days?"

"You were asked to give an account of everything you knew of General Arnold's transactions within a short time past. I do not remember the precise period."

"Was it in consequence of threats from General Washington, that I gave that account?"

"Colonel Harrison has already given a just idea of what passed from the general to you on that occasion. The general expressed himself with some warmth."

"Did you not hear his Excellency tell me that General Arnold was gone off to the enemy?"

"I believe I did."

"Did I not confess that I was ignorant of his going off, upon the general's informing me of it?"

"I believe you did."

"Don't you recollect that General Washington mentioned to me, that this man whom I brought on shore by the name of John Anderson, was the adjutant general to the British army?"

"I think I do."

"Did I not appear very much surprised at hearing it?"

"I do not exactly recollect your appearance at this time."

Question by the prisoner to Colonel Harrison. Did you not see surprise in my conduct, on being informed that the person whom I brought on shore was adjutant general to the British army?

Harrison. As I observed before, you in the commencement of your examination behaved with great firmness and great consistency, but on matters being disclosed to you, and the general's telling you it would be better to make a candid and open confession, you discovered a good deal of surprise; and here I would observe, that it was only the afternoon of the preceding day that General Washington himself had received an account of the capture of Mr. John Anderson, who afterwards proved to be Major John André, adjutant general to the British army, and of the escape of General Arnold to the enemy; supposing your examination was on Tuesday, it was on the preceding day that General Washington had received an account of the capture of Major André, the adjutant general to the British army, and of General Arnold's having gone off to the enemy; and that you had been seized, the night of General Arnold's escape, by Colonel Gouvion, and brought down to Robinson's house in the Highlands, and probably had not had the means of knowing these events, until the period of your being informed of them by the general. As to the motives of your surprise, I can-

not undertake to say what they were. I recollect that Mr. Smith mentioned, in the course of his examination, that when he approached or was near the Vulture, the precise expressions I do not recollect, he was hailed, and received some rough language, but I did not understand, after he was on board the vessel, that he received any incivilities or rough treatment from the officers of the ship. I also recollect, that upon questions being asked Colonel Hamilton, about the mode of Mr. Anderson's going to Mr. Smith's house, it appeared to me that Mr. Smith left Arnold and Anderson together at the place of landing, and that he himself proceeded in the boat with the two persons to some upper landing, and that there had occurred some difficulties about going on board the vessel again.

Question by the prisoner to Lieutenant Colonel Hamilton. Don't you recollect that when I said that I had brought one Anderson on shore, I said that I understood that Anderson was to negotiate Robinson's business with General Arnold?

Hamilton. You did profess that supposition.

Question by the court to Samuel Cahoon. Do you know who wrote the letter you carried to General Arnold?

Cahoon. I don't know, I got it from Mr. Smith; I don't know whether the letter was sealed or not; it was night when I got it, and had it not out of my pocket until I got to the general's.

"Had you particular directions not to deliver that letter to any person but the general?"

"To the best of my recollection I had not."

Cornelius Lambert. The prisoner passed King's Ferry betwixt daylight and dark, in company with another gentleman and a negro with him; the negro I took to be Mr. Smith's waiter, but the day of the week, or day of the month I can't recollect; it was last month, and as near as I can tell it was the week before last, and was near about the time of the firing at one of the enemy's vessels, in the North river, but whether before or after I can't tell; Mr. Smith seemed to hurry us a good deal, and told us he would give us something to revive our spirits; this was upon the water as we were going over; I do not recollect the person's name who crossed with Mr. Smith; it was between daylight and dark, and as near as I can tell, he had on a large coat, dark-colored, either brown, blue, or black, and had on a round hat and boots; Mr. Smith and this person crossed from Stony Point to Verplank's Point.

"Have you seen the person since, that crossed with Mr. Smith?"

"Not to know him."

"Did you hear any conversation between Mr. Smith and this person, while in the boat crossing?"

"Mr. Smith got in the bow of the boat, and this man on the side of the boat; and as we were crossing, Mr. Smith walked up to the man, and whispered a word or two to him, which I did not hear."

"Did Mr. Smith, when he told you he would give you something to revive yourself, when you were crossing, tell you how far he had to ride that night, or the way he was going, or did he give you anything when you landed?"

"I did not hear him say which way he was going, or how far he was to ride; when we landed he called the cockswain of the boat into the house."

Henry Lambert. Mr. Smith crossed King's Ferry the week before last, in company with another gentleman; it was in the dusk of the evening; I do not recollect the day of the week or day of the month he crossed; it was after firing on the enemy's ship in the North River, but I do not know how long; I do not know the person's name, neither do I recollect his dress. I steered the boat; they had horses with them; Mr. Smith seemed to be in a hurry to cross, and on the water, as we were crossing, told us he would give us something to revive our spirits, if we would row across soon; Mr. Smith had also a negro man along with him; I did not take notice of the horse the gentleman rode who was with Mr. Smith; Mr. Smith and the person crossed from Stony Point to Verplank's Point.

"Have you seen the person since who crossed the ferry with Mr. Smith?"

"If I have seen him I have not known him."

"Did Mr. Smith give you anything after you had crossed the ferry?"

"Yes; after we crossed the ferry, Mr. Smith called for the coxswain of the boat, and went into Welsh's hut, upon which I went, and he gave me an eight dollar bill."

"Where was the other gentleman at this time?"

"I don't know."

"Did Mr. Smith tell you the reason of his hurry-

ing you was, that he wanted to gain some distant place that night?"

"He did not. Neither did he mention what his business was."

"Did you hear any conversation between the person and Mr. Smith in the boat?"

"I did not; but when Mr. Smith was coming down to the ferry, he called out to Captain Cooley, and told him in three weeks' time we would be in New York. Captain Cooley answered, 'I don't know;' Mr. Smith then said, 'well, let it be three months;' Mr. Smith seemed to be very lively, and in a joking humor, when he said it. Mr. Smith and the person who crossed with him were both on horseback at the time; the other person said nothing. When Mr. Smith said the words aforementioned to Captain Cooley, he called for some liquor, drank it, and pushed down to the ferry, and asked for the ferry-men."

Lambert Lambert. Mr. Smith crossed King's Ferry in company with another person in the evening, but the day of the week or day of the month I do not recollect. I cannot tell how long it was ago; I know not the person's name who crossed with him; neither have I seen the person since to know him. I don't recollect any conversation between Mr. Smith and the man in the boat, but Mr. Smith was joking a good deal with the ferry-man as he crossed; Mr. Smith did not mention where he was going to, or what his business was; it was the week before last; Mr. Smith and the person crossed from Stony Point to Verplank's Point.

"Did Mr. Smith cross the ferry in your boat at any time within a week, before he crossed the evening you have mentioned?"

"I don't remember that he did."

[Mr. Smith here admitted that he crossed King's Ferry on Friday evening, the twenty-second day of September last, from Stony Point to Verplank's Point.]

William Van Veart. Mr. Smith crossed King's Ferry from Stony Point to Verplank's Point in the evening of a day in the week before last, in company with another man, and a negro boy was with him; each of them had a horse; the day of the month I do not recollect; I have not seen the person since to know him; he had a black, blue, or brown great-coat on, a round hat, and a pair of boots; I did not hear any conversation pass between Mr. Smith and the person in the boat; neither did I hear Mr. Smith say which way he was going; Mr. Smith seemed to hurry us a good deal; Cornelius Lambert, Henry Lambert and Lambert Lambert were boatmen and along with me.

Benjamin Acker. Mr. Smith crossed just in the dusk of the evening King's Ferry from Stony Point to Verplank's Point, but I don't recollect the day of the month or the day of the week; it was after the firing upon one of the enemy's ships in the North River, but I don't know how long; there was a person with Mr. Smith, but I don't know his name; I have not seen that person since to know him; the person had a pretty big round hat on, and a great coat, which I took to be blue, and boots; they had horses

with them; I did not hear any conversation pass between Mr. Smith and the person while they were in the boat.

William Jameson. On Friday evening, just as it was getting dusk, the twenty-second day of last month, Mr. Smith came to my tent, at King's Ferry, on Stony Point side, after sun down, with a gentleman in company and a waiter; the gentleman rode a little past the tent, who was in company with Mr. Smith, and Mr. Smith made a halt. There were some gentlemen sitting in the tent, who handed him a bowl of liquor which they had been drinking out of, upon which Mr. Smith dismounted his horse and handed the bowl to me, and desired I would fill it, which I did. As I handed him the liquor again, Mr. Smith spoke to Mr. Cooley, and said, in three weeks time we should be all in New York. Mr. Cooley made answer, "sir, I don't know," upon which Mr. Smith said, "let it be three months." Mr. Smith, upon this, took his horse and went off down to the ferry stairs. The person with Mr. Smith had on a flopped hat and a great-coat, the color I cannot recollect; the person rode a little past when Mr. Smith halted, made a little halt, and he was on the ferry stairs when Mr. Smith got down. Mr. Smith, at my tent, took one drink out of the bowl, handed it about, and then went down to the ferry stairs; I did not know the person's name; neither have I seen him since to know him.

"Did the gentlemen who were drinking desire Mr. Smith to call his friend, or did any of them ask Mr. Smith who it was that was with him?"

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"Not that I recollect."

"Did Mr. Smith appear to be in a hurry, or say, which way he was going?"

"He appeared to be in a hurry and hurried the ferry-men down, some of whom were at the tent; he did not say where he was going."

"Did you hear Mr. Smith mention the person's name who was with him?"

"There were no names mentioned to my knowledge."

The Prisoner. Did the conversation with Captain Cooley appear to be in a joke or in earnest?

"You were in a joking humor when you came into the tent, and I supposed that you were joking with him."

William Cooley. Three persons, one of whom was Mr. Smith, came riding down to King's Ferry, on the Stony Point side, on Friday, the twenty-second day of last month, about dark; there were some of Colonel Livingston's officers with me in the tent. Mr. Smith came riding along, and when he came opposite the tent, the officers hailed him and put out the bowl to him, and asked him if he would not drink; he said, yes; the other persons kept riding along; there was nothing in the bowl; Mr. Smith got off his horse and called for a nip of grog and drank. They were a joking together, and Mr. Smith said to me, "What do you think, Daddy Cooley, or Captain Cooley, or something to that purpose, of being in New York in three weeks time?" Upon that the gentlemen officers laughed a little. I said, "not, I am afraid Master Joseph," or something to that

purpose. "Well," said he, "let it be three months, then." I just drank, the officers being then joking and laughing together, and Mr. Smith went off. I did not see the persons who went down, to know them, nor heard their names mentioned; neither did any person ask about their names; no person, that I heard, asked Mr. Smith where he was going, or what his business was; neither did he mention it.

The Prisoner. What was my political character in New York; please to inform the court all that came to your knowledge about it?

"I always looked upon you as a good and faithful subject to America; I have seen you strip and fight several times in New York, and once with the mate of the Asia man-of-war, about America. I have seen you wrangle with many men who opposed the American cause, in New York."

"Be pleased to inform the court what you have thought of my political character since we have left New York."

"I have always thought you a hearty man for America, and never looked upon you in any other light until this very time, and how it is now, I know not. I believe the whole neighborhood at Haverstraw, where you live, look upon you as a hearty friend to America, but we do not look upon the rest of your brothers to be anything to the cause of America."

Captain Ebenezer Boyd. Last Friday, a week ago, I think it was the twenty-second of September last, between eight and nine o'clock, as near as I can recollect, at night, the sentry stopped Mr. Smith, the

prisoner, another person, and a negro with him. When the sentry hailed them, they answered, his friends. The sentry ordered one to dismount; Mr. Smith readily dismounted, and spoke to the person who was with him to hold his horse, and Mr. Smith advanced till he came near the sentry. Mr. Smith asked who commanded the party; the sentry said Captain Boyd; upon that I was called for. What passed between Mr. Smith and the sentry I heard, as I have related, being close by the sentry. Mr. Smith came to me, upon my calling for him. I asked him who he was; he told me his name was Joshua Smith, and that he had a pass from General Arnold to pass all guards. I asked him where he lived, or where he belonged; he told me he lived in the white house on the other side of King's Ferry. I asked him what time he crossed the ferry; he said about the dusk of the same evening. I asked him how far he was bound for, and where to? He told me he intended to go that night as far as Major Strang's. I told him Major Strang was not at home, and he spoke something of going to old Colonel Gil Drake's, as he was an old acquaintance of his. I told him he did not live where he was used to, but had moved to Salem. I told him about his saying he was going to Major Strang's, that his lady might be in bed, and it would incommode her much, likewise I desired to see Mr. Smith's pass, and went into a little house close by there, and got a light; I found that he had a pass from General Arnold; to "pass all guards to the White Plains, and return, being on business of importance," I think were the words of the pass, if I

recollect right; after I had read the pass, we came out, and Mr. Smith and myself talked alone privately. Then I desired him to let me know something of his business; he made answer that he had no objection to my knowing it. He told me that he was a brother of William Smith, in New York, though very different in principle, and that he was employed by General Arnold to go with that gentleman, meaning the person who was with him, to get intelligence from the enemy, that they expected to meet a gentleman at or near the White Plains, for the same purpose. If I recollect right, I think Mr. Smith told me he was not so positive as that he should go himself as far as the White Plains or not. On this I advised Mr. Smith to put up there, at one Andreas Miller's, close by where we were, and so start as soon as it was light; the reasons I gave Mr. Smith were, that the riding in the night would be dangerous when they got below Croton river, from the cow-boys. Mr. Smith made answer that he would speak to his partner; whereupon Mr. Smith went to him; I was pretty close by them; and when they conversed together, they spoke low. Mr. Smith told him he thought it would be rather best to put up, and said he thought they might be interrupted; upon that they concluded to turn back to this house, to put up. I concluded in my mind their speaking low was occasioned by what Mr. Smith had said to me before, which was, he did not want every one to know what business they were on. Mr. Smith then asked my opinion about the roads, which would be the safest to the White Plains, and not fall into the hands of

these cow-boys or refugees. Putting confidence in what they were upon, I gave him my opinion as to the safest road; that the safest road would be to go by North Castle church, and by Wright's mills, by reason if they went the Tarrytown road, they would fall into the lower party's hands — these cow-boys.[1] I likewise advised him to call upon Captain Delavan next morning, pretty early. Mr. Smith asked me if I thought that Captain Delavan would assist them with an escort of two or three horse. I told him I did not doubt but that he might when he came to understand what his business was. They then went back towards Andreas Miller's, which was the last I saw of them that night. I was a little at a stand about Mr. Smith's name being Joshua, as he was called by the name of Jo Smith, but his pass was in the name of Joshua. What made me put more confidence in what Mr. Smith told me, was, I had heard it frequently mentioned that General Howe used to employ Mr. Smith in getting intelligence.

"Was the person's name who was with Mr. Smith mentioned that night?"

"I think I asked Mr. Smith what gentleman it was who was with him. Mr. Smith said he was a gentleman that General Arnold had in his employ, and told me his name was John Anderson."

"Was John Anderson's name included in the pass Mr. Smith showed you from General Arnold?"

"I think it was."

[1] The *cow-boys* were a set of people, mostly if not wholly refugees, belonging to the British side, and engaged in plundering cattle near the lines, and driving them to New York.

"Did Mr. Smith mention any particular information they were going for?"

"Not any particular information, but in general. Mr. Smith said they expected to get some of the best intelligence from the British army, that had been got for some time."

"How was this person, called by the name of John Anderson, dressed?"

"He had a large overcoat on. It appeared to be blue or black in the night. He did not go into the house with Mr. Smith and myself. The person under the name of John Anderson had a round hat on — the size I did not take particular notice of. I did not speak to the person."

"Are the cow-boys, or plundering parties, from New York?"

"Yes, of Delancy's corps."

"Did you inquire of Mr. Smith where this John Anderson belonged, or where his abode was?"

"I did not."

"The person whom you saw that night with Mr. Smith, who he said was called John Anderson, have you seen since to know him?"

"I have not."

"Did Mr. Smith appear anxious to proceed that night?"

"No. He appeared anxious to put up; more than his partner did; and Mr. Smith seemed very ready to comply with my advice, as soon as I mentioned it to him."

"How far is it from the place you saw Mr. Smith and the person he called John Anderson, to Verplank's Point?"

"About eight miles, and about four to Peekskill, on the east side of the North river."

"Did Mr. Smith appear to you to be alarmed after he came up to you, on being stopped?"

"I did not perceive that he was."

"Did you understand from Mr. Smith, that either himself, or the person he called John Anderson, intended to go to New York?"

"I did not."

[Two permits were shown to Captain Boyd, one dated Head Quarters, Robinson's House, September 20, 1780, and the other dated Head Quarters, Robinson's House, September 22, 1780, signed B. Arnold, M. General, neither of which, Captain Boyd thought was the pass Mr. Smith showed him. Mr. Smith acknowledged that the permit dated September 22d, 1780, was the one he showed Captain Boyd. The other not being proved or acknowledged, was withdrawn.]

"Was the pass Mr. Smith showed you wrote and signed in one hand writing?"

"It appeared to me it was."

"How far is it from the place you saw Mr. Smith and the person he called John Anderson, to the White Plains?"

"I judge it to be about twenty-four miles."

The Prisoner. What political character does Major Strang bear in that country?

"He is allowed to be as good a man as any we have there, in his attachment to America."

"What political character did Mr. Gil Drake bear, who lived formerly near Crom pond?"

"His former character was that of a very warm whig."

"Did I not appear pleased with your proposal of going to Captain Delavan's?"

"You made no objections against going there to me, and told me you would call upon him the next morning, which I expected you would, from what you said."

"Don't you recollect your mentioning to me that Captain Delavan was a warm friend to the country?"

"I do."

"Did you not see me return the next morning?"

"I did not."

"Is it not reputed by the neighborhood about Crom pond, to be dangerous to go on the south side of Pine's bridge?"

"The friends of the country in that neighborhood think it so."

"Did you not hear that a day or two before there was a party seen, about thirty, near Pine's bridge?"

"There was an alarm on Wednesday, the twentieth of September last, of a party being near Sing Sing, who were coming up, it was said, by the new bridge, and in consequence of it, I ordered my company out; it proved to be a false alarm."

"Don't the inhabitants who live near Pine's bridge, live in great dread with respect to their cattle and themselves, from parties coming out?"

"There are not many inhabitants there that are considered to be well affected."

"How far do you suppose Hunt's house to be

from the parting of the two roads leading to Pine's bridge ?"

"About a mile to the northward. Hunt is one of Delavan's corps of horse, and is called well affected."

Question to Jameson. Do you know of any particular intimacy being between Benedict Arnold, late major general in our service, and the prisoner, Mr. Smith, a short time before his, Arnold's, going off to the enemy ?

"I have seen General Arnold come down to King's Ferry, on the Stony Point side, and frequently go from the ferry, but where to I don't know. I have seen Mr. Smith return to the ferry with him ; the number of times I do not recollect ; it was about a week or two before General Arnold went off to the enemy, and the week he did go off to the enemy. I can't recollect whether I saw General Arnold and Mr. Smith together, the week General Arnold went off to the enemy, more than once or twice ; I saw General Arnold come to King's Ferry, on the Stony Point side, on Tuesday or Wednesday ; it was the beginning of the week ; he went up the river towards Robinson's house, and returned on Thursday, in the evening, to the ferry on Stony Point side, before dark ; General Arnold's barge went up the river, and returned to King's Ferry, that evening, with a boat, and I saw General Arnold go up towards Robinson's house, on Friday morning, about nine or ten o'clock ; Mr. Smith came down to the ferry with him, and returned, and that evening Mr. Smith came down to the ferry with a gentleman, as I have men-

tioned before in my evidence. I do not recollect of seeing General Arnold at Mr. Smith's house."

Major Burroughs. Last Friday, a week ago, being the twenty-second day of September last, between sundown and dark, I was overtaken on the road, about three quarters of a mile from Stony Point, by Mr. Smith, the prisoner, and another gentleman. Mr. Smith's servant, a negro boy, was with him. Mr. Smith, as he passed by, spoke and said, "how do you do, Captain Livingston?" I told him he was mistaken; on that he stopped, and said, "how do you do, Major Burroughs?" and turned about his horse, and talked to me, for about a minute, in which time I rode up between the gentleman who was with Mr. Smith, and which gentleman is the same man who has been proved since to have been the adjutant general of the British army. Mr. Smith, while he stopped, told me he was going for Mrs. Smith and the ladies, to West Point, and should be happy to see me at tea the next afternoon. Mr. Smith then turned about his horse, and rode off pretty fast; I told him I thought it rather late, and he said he had business.

"How was the gentleman dressed?"

"He had a round hat on, and a blue coat or cloak, the cape of which was buttoned up tight round his neck, and the other part was also buttoned?"

"Did Mr. Smith mention to you the person's name?"

"No."

"After Mr. Smith left you did the gentleman who was with him join company and ride off?"

"The gentleman halted when Mr. Smith did, and they rode off together."

"Did you see Major André, who lately suffered death, as being adjutant general to the British army?"

"I saw him when he crossed the North River, which was last Wednesday, and which was after he was taken, and I am sure he was the same man whom I saw with Mr. Smith, as I have before mentioned."

"Had this person the same coat on that the gentleman had whom you saw with Mr. Smith?"

"He had a coat or cloak of the same color, which appeared to me to be the same, and I am sure he had the same hat on."

"Did you hear him converse with Mr. Smith?"

"I did not."

"Did you see Major André, adjutant general to the British army, since the time you have mentioned to have seen him after he was taken, and had crossed the North River?"

"I saw him last Friday, when he was going before the board of general officers, and I am certain he was the same person I saw with Mr. Smith at the time I have before mentioned."

The Prisoner. Do you recollect no other conversation that passed between us when I stopped, with this person on the road; don't you recollect something about a horse?

"I recollect about your telling me that you had good pasture, and that I should be very welcome to the pasture for my two horses, rather than let them run about at the point where the pasture was poor."

"Did you see any appearance in me of a desire to avoid you as I came along?"

"Not in the least."

"Did your guard, at the lower end of Haverstraw, report to you of their meeting some gentlemen, the night before, on the road?"

"They did not."

John Paulding. Myself, Isaac Van Veart, and David Williams were lying by the side of the road, about a half a mile above Tarrytown, and about fifteen miles from King's bridge, on Saturday morning, between nine and ten o'clock, the 23d September last. We had lain there about an hour and a half, as near as I can recollect, and saw several persons we were acquainted with, whom we let pass. Presently, one of the young men who were with me said, "there comes a gentlemanlike looking man, who appears to be well-dressed, and has boots on, whom you had better step out and stop, if you don't know him." On that I got up and presented my firelock at the breast of the person, and told him to stand, and then I asked him which way he was going. Says he, "Gentlemen, I hope you belong to our party." I asked him what party; he said, "the lower party." Upon that I told him I did. Then he said, "I am a British officer out of the country, on particular business, and I hope you won't detain me a minute;" and to show that he was a British officer he pulled out his watch; upon which I told him to dismount. Upon that he said, "My God, I must do anything to get along;" seemed to make a kind of a laugh of it, and pulled out General Arnold's pass, which was to John Anderson to pass all guards to the White Plains, and further. Upon that he dismounted, and says he, "Gentlemen you had best let me go, or you will bring yourselves in trouble, for by

your stopping of me you will detain the general's business," and said he was to go to Dobb's Ferry, to meet a person there on the general's business. Upon that I told him I hoped he would not be offended, and told him we did not mean to take anything from him ; that there were many bad people going along the road, and I did not know but perhaps he might be one ; and I asked him if he had any letters about him. He made answer, " No." Upon that, myself, or one of my comrades, though I think myself, told him to pull off his clothes, which he did. We searched his clothes, but could find nothing, and I told him to pull off his boots ; he rather seemed backward of pulling them off; however, he pulled off one of them, and I felt at his foot, where I felt the papers in his stocking, under his foot. Then I told him to pull off the other boot, and when the other boot was off I found other papers in his stocking, under his foot. Then I looked on the back of the papers, and I saw what the contents of them were, and I said to the young fellows who were with me, " this is a spy." One of the young fellows who were with me asked him if he would give us his horse, saddle, and bridle, and watch, and a hundred guineas, if he would let him go. He made answer, " Yes, and whatever sum of money you will mention, or quantity of dry goods." And then I made answer, " No, by God, if you would give us ten thousand guineas, you should not stir a step." One of the young fellows winked to me, who had a mind to find out a little more, and I made answer to the lads who were with me to come along, for I would have

nothing more to say to him. We asked him some questions as we were going along the road, and he begged we would ask him none till he came to some officers, and then he would reveal the whole. We carried him to Colonel Jameson, and there he took him into his custody, and I have not seen him from that time until I saw him the other day.

"Did he tell you his name was John Anderson before he produced the pass?"

"I asked him his name, and he told me it was, I think, John Anderson."

Sundry papers of the following import were produced to the court, and shown to the witness, to wit, a paper containing artillery orders at West Point, September 5th, 1780 — a paper containing an estimate of the force at West Point and its dependencies, September 13, 1780 — a paper containing an estimate of men to man the works at West Point, and in the vicinity, September 1780 — a paper containing a return of ordnance at West Point and its dependencies, September 5, 1780 — a paper containing remarks on works at West Point, indorsed, "a copy to be transmitted to his Excellency, General Washington," September 1780, — and a paper containing a state of matters laid before a council of war, held in Camp Bergen county, September 6, 1780: present, the commander-in-chief — indorsed "copy of a council of war, held September 6, 1780." The witness being asked if he found these papers on the person he took, as he had mentioned, under the name of John Anderson, said —

"To the best of my knowledge the papers now

shown me are the papers I found on that person when I took him."

"How was this person, whom you took under the name of John Anderson, dressed?"

"He had a kind of a purple claret-colored coat on, the button-holes of which were laced. He had nankeen breeches and waistcoat on, and a flannel waistcoat under his waistcoat, and had a round hat on; he also had on a blue-colored overcoat."

"Was this person whom you took under the name of John Anderson, the same person who suffered death on Monday last, as being the adjutant general of the British army?"

"I think he was; to the best of my knowledge he looked as much like him as any person could."

"When he pulled out the watch, did he offer it to you as a present, or pull it out as a signal?"

"As a signal that he was a British officer, as I then thought."

"When pulling out his pass from General Arnold, what was the reason you did not let him go?"

"Because he said before he was a British officer. Had he pulled out General Arnold's pass first, I should have let him go."

"How long did the person under the name of John Anderson say he had been out from New York?"

"Four days, and had not been above Pine's bridge, and that a man brought the letters and papers to him there, but he did not know him."

David Williams. Myself, Isaac Van Veart, and John Paulding, were lying in the bushes, in the morning, about nine or ten o'clock, on Saturday, the

23d of September last, as near as I can recollect, about a half a mile, as near as I can recollect, above Tarrytown, on the east side of the North River. Several persons came along whom we knew and let pass, and presently came along a person whom we told Mr. Paulding to stop; he was a gentlemanlike man and had boots on. Mr. Paulding stepped out, and presented his piece to his breast, and bid him stand, which he did. The person said, "Gentlemen, I hope you belong to our party." Mr. Paulding made answer, "What party?" he said "the lower party," which Mr. Paulding told him we did. The person said, "I am glad to see you," and said, "I am an officer in the British service, and have now been on particular business in the country, and I hope you will not detain me;" and for a token to let us know that he was a gentleman, he pulled out his watch. Mr. Paulding told him to dismount, on which the person found out we belonged to the upper party: He said, "my God, I must do anything to get along;" on which he pulled out General Arnold's pass, and gave it to Mr. Paulding, who read it, on which Mr. Paulding told him to dismount; and the person said he was to pass down as far as Dobb's Ferry, and was to meet another gentleman there, and was to get intelligence for General Arnold; he told us we would bring ourselves in trouble if we did not let him go. We told him there were many bad fellows travelling the road, and we did not know but he was one of them, on which we took him in the bushes and ordered him to pull off his clothes, which he did; but on searching him narrowly, we could not find any

sort of writing. We told him to pull off his boots, which he seemed to be indifferent about, but we got one boot off; and searched in that boot, but could find nothing, and we found there were some papers in the bottom of his stocking next to his foot, on which we made him pull his stocking off, and found three papers wrapped up. Mr. Paulding looked at the contents, and said he was a spy — upon which we made him pull off his other boot, and there we found three more papers at the bottom of his foot within his stocking, upon which we made him dress himself, and I asked him what he would give us to let him go; he said he would give us any sum of money. I asked him whether he would give us his horse, saddle, bridle, watch and one hundred guineas, upon which he said yes, and told us he would direct it to any place, even if it was that very spot, so that we could get it. I asked him whether he would not give us more; he said he would give us any quantity of dry goods, or any sum of money, and bring it to any place that we might pitch upon, so that we might get it; upon which Mr. Paulding answered, "No, by God, if you would give us ten thousand guineas you shall not stir one step;" on which I asked the person who had called himself John Anderson if he would not get away if it lay in his power, on which he answered me yes, he would. I told him I did not intend he should, and carrying him along, we asked him a few questions, and we stopped under a shade; he begged us not to ask him any questions, and said when he came to any commander he would reveal all. We carried him on and delivered him to Colo-

nel Jameson, and I never saw him from that time until when he was executed here, that I remember; and I think the man, to the best of my knowledge, if I recollect right, who was executed on Monday last, as being adjutant general to the British army, was the very man whom the persons I have mentioned and myself took, as I have mentioned before.

"How do you know that his name was John Anderson?"

"He told us his name was John Anderson, when he pulled out his pass to show us."

"How was the person you took, who called himself John Anderson, dressed?"

"He had a blue overcoat on, and a tight body coat that was a kind of a claret-color, though rather a deeper red than claret — the button-holes were laced with gold tinsel, and the buttons drawn over with the same kind of lace — a round hat and nankeen waistcoat and breeches, and under his waistcoat was a flannel waistcoat, and under his breeches was a pair of flannel drawers — he had a pair of boots and thread stockings on."

"Is the lower party considered as the enemy's party?"

"Yes."

The papers shown to Mr. Paulding were shown to Mr. Williams; he said that the paper containing an estimate of men to man the works at West Point and in the vicinity, September, 1780, and the paper containing a return of ordnance at West Point and its dependencies, September 5, 1780, were two of the papers which he and the persons who were with him

found on the person whom they took, as before mentioned, under the name of John Anderson, as he saw Mr. Paulding open them; the others he did not recollect to have taken notice of.

"How many papers were taken on the person whom you took under the name of John Anderson?"

"There were three under each foot."

"Did this person, who called himself John Anderson, tell you where he lodged the night before?"

"He did not; but said he had received the papers and the horse at Pine's bridge, from a gentleman who brought them there to him, as near as I remember."

Colonel Tilghman was produced on the part of the prosecution. The papers that were shown to Mr. John Paulding were shown to Colonel Tilghman, and he was asked whether, from the knowledge he had of Benedict Arnold's writing, he believed these papers were written by him?

"The pass was certainly written by Benedict Arnold, late major general in our service. The body of the paper indorsed 'Artillery orders, September 5, 1780,' containing artillery orders at West Point, and the indorsements were certainly written by him. The name at the bottom I am not certain of, though he appears to have endeavored to have written like Major Bowman, as people often do, when they are copying. The paper, being an estimate of the force at West Point, and its dependencies, was written by General Arnold, as well as the indorsement; the paper being an estimate of men to man the works at West Point, and in the vicinity; with another in-

dorsement was also written by him. The paper containing a return of ordnance at West Point and its dependencies, was also written by him; the paper containing remarks on works at West Point, was also written by him; the paper indorsed "Copy of council of war, held September 6, 1780," containing a state of matters laid before a council of war, September 6, 1780, by his Excellency General Washington, was also written by him; the paper containing the names of sundry persons was written by him.[1]

The Marquis de la Fayette.[2] When Mr. Smith was put in the room at Robinson's house, it was in the morning, the day after Arnold had escaped to the enemy; there were present General Washington, General Knox, Lieutenant Colonel Hamilton, Colonel Harrison and myself; he began by making strong assurances of his candor, and other assurances, which were not necessary to the relation of what had passed, and what was asked from him, at that time; but being pleased to go on with his story, he said

[1] See the Appendix for papers relating to this trial.

[2] The prisoner seems to have been very much annoyed at the testimony of La Fayette, and speaks of him with great bitterness. "He delivered his evidence," says Smith, in his narrative, "with acrimonious severity, and malignant bitterness: he asserted as part of my declaration to General Washington matters that I could not have mentioned; and had my life, or that of a hundred others, depended on his credibility before an ignorant court-martial, all would have been forfeited. I had paid particular attention to the testimony of General Knox and Colonel Hamilton, in my notes taken on their evidence; and in my cross-examination of the marquis, I applied their answers and remarks to his recollection, which did not a little embarrass him I could plainly perceive the court-martial were sensible that he was mistaken; and I most sincerely hope he erred from ignorance of the true import of the English language."

that he had been sent by General Arnold on board the Vulture, British man of war, with a flag in the night, in order to bring on shore Colonel Robinson; that being on board the Vulture he was roughly used by the crew of that ship, that instead of Robinson, one Mr. Anderson, whom, as far as I remember, he said he did not know before, came with him in the boat, and on being arrived on shore they met on the beach General Arnold; that General Arnold, Anderson and himself, came to Mr. Smith's house; that Anderson was to return, on board the Vulture, but it was designed afterwards, between them, that he should stop in the house, where he was kept in a private room, and that Mr. Smith sent up to him his breakfast and dinner; that towards the evening Mr. Smith, in order to disguise Anderson, who had, until then, been in a British uniform, gave him one of his own coats, and crossed with him King's Ferry, and accompanied him some distance — a pretty great distance; I do not recollect the place where he said he accompanied him, on the east side of the North River. The question being put to Mr. Smith, why he had undertook that business, he said he thought he was serving his country, as he was led to believe that General Arnold had opened very important correspondence with Colonel Robinson; he was then asked if he thought that it was a good way to serve his country to go on board a British ship to get intelligence, to which he answered that he did not believe that Arnold was a traitor; being asked if he thought himself under the sanction of a flag in the darkness of the night, he answered yes. The question being

put to him why he did not return by water on board of the Vulture, he said it was on account of his bad state of health; and upon our observing that the ill state of his health had not prevented his riding many miles, he attributed that land journey to another reason, and said that the boatman were tired or unwilling to return; being asked why he took so much pains to disguise Mr. Anderson, he said that he thought such a secret ought not to be known by the people, and repeated his assurances that he had no other idea, but that of rendering an important service to his country; and being pressed to discover the truth, as the only way of saving himself, he said he had nothing else to relate.

"Did Mr. Smith mention the day of the week, or day of the month he was on board of the Vulture?"

"He did; and it corresponded with the time we had heard, but the day I do not recollect."

"Did Mr. Smith say that Anderson had on a British uniform at the time he came to his house?"

"He said, I think, that he had something over him, in coming from the Vulture, but on telling him that he had given him another coat to disguise himself, I think he did acknowledge that he had a British uniform on in his house."

"Did Mr. Smith say that he went from the beach, after landing with General Arnold and Anderson, to his house?"

"I think he did; but, however, as far as I can remember, he told that a private conference had taken place between the general and Anderson, when Anderson arrived on shore."

"Did he say that he was present at any conference that had passed between Anderson and the general at his house?"

"He said he was not present at any of their conferences, and he did not know the contents of them."

"Did Mr. Smith appear embarrassed in the course of his examination?"

"From the length of his protestations, before entering into the relation of the account he gave of his conduct, I apprehended that he was embarressed."

"Do you recollect whether Mr. Smith mentioned about returning to his house with Anderson and Arnold, after he had landed Anderson, or whether he said he returned by land or water?"

"I do not remember exactly, but I thought he did accompany them by land."

"Did you understand Mr. Smith that he crossed King's Ferry with Anderson, the evening after he had landed him from the Vulture, on an interview with General Arnold?"

"I did."

"Did Mr. Smith appear to keep back any of the business he was employed in by General Arnold?"

"He really told the whole of the story himself freely, except the changing of the coat, and I thought he was not candid in relating the reasons which prevented his returning by water on board the Vulture.

"Did Mr. Smith say that General Arnold asked him for a coat to disguise this Mr. Anderson?"

"I rather think that he did, but, however, do not recollect it clearly."

"Had you any reason to think that Mr. Smith was acquainted that General Washington was informed with the part he had acted, until General Washington intimated it to him himself?"

"From the manner in which Mr. Smith was taken up, and brought to Robinson's house, I did not believe that he could have any doubts on that matter, but nothing appeared which could confirm or destroy that opinion of mine."

"Do you recollect whether Mr. Smith mentioned the time General Arnold left his house?"

"It seems to me Mr. Smith spoke of the time that General Arnold left his house, but I do not recollect it."

The Prisoner. "Did I not say, when I said that General Arnold asked me for a coat for this Mr. Anderson, that General Arnold said he was only a merchant, and from false pride had borrowed a British uniform coat?

"You may have said so, but I don't recollect it; it is true I was not attending during the whole time, there being many questions asked which I do not remember."

"Did you not hear me expostulate with his Excellency about the manner in which I was taken, and brought down to Robinson's house?"

"I did."

"Did you not see me the Sunday evening at General Scott's at Fishkill, preceding the Tuesday morning I was brought to Robinson's house?"

"I was told by his Excellency's family, or some other officer, that you had been there, but do not recollect to have seen you myself."

"Did you think, from the whole of my conduct when before General Washington, when interrogated, I discovered a disposition to declare all I knew about this matter?"

"Your omitting the circumstance of the changing of the coa., and the reasons you gave for not returning on board the Vulture by water, in the same way that you came, led me to believe that you did not mean to be candid; I made you that observation at the time."

"Do you recollect, in the course of the examination, that Mr. Smith was asked how he could reconcile Mr. Anderson's coming on shore in the room of Robinson, from the Vulture, to treat of matters relative to Robinson's estate; if you do, what was Mr. Smith's answer?"

"I recollect the question except that part which relates to the estate; I don't recollect the answer."

Brigadier General Knox. I was present at Robinson's house the morning of the twenty-sixth of September last, with his Excellency, when Mr. Smith was brought in. The general prefaced the matter with a short narrative of what had happened, which was that General Arnold had gone off to the enemy, that Major André, the British adjutant general was taken, that they had had a meeting or interview at Mr. Smith's house, and that there were strong reasons to induce a belief that Mr. Smith knew the substance of the conversation, that had passed between General Arnold and Major André, and he exhorted Mr. Smith to make a full confession of all that he knew respecting the matter. Mr. Smith made great

protestations of his attachment to the liberties of America, that what he had done he conceived to be for the public good, that he should, in a candid manner, relate every circumstance that he was master of. Mr. Smith said that he had been employed by General Arnold, to procure intelligence, and that he conceived a design, which General Arnold informed him of, was in pursuance of that purpose. The design was to go on board the Vulture man-of-war, and bring from thence *a person* who, General Arnold informed him, could give very material intelligence, and put things in such a train, that in future he should be at no loss for intelligence of the enemy's movements; that the last Thursday evening, the twenty-first of September, he with two other persons went from a place, which Mr. Smith called, I think, Hays's creek, in a boat on board of the Vulture, that when he came near the Vulture he was hailed, and told to come on board in very violent and abusive language; that he went on board, was ushered into the cabin where he saw Colonel Robinson and the person whom he brought on shore, who, he was informed, was Mr. John Anderson; that he had conceived that he was to have brought Colonel Robinson on shore, but that he declined coming, and assured Mr. Smith that Mr. Anderson would answer all the purposes; that they came on shore to a place a little below Haverstraw landing, where he met General Arnold, who was upon the beach; that he left Mr Anderson and General Arnold together, and with the two men carried the boat into the creek from which he had taken it, and that by the time he got into the creek with the

boat, day began to appear; that upon his return to his house he found General Arnold and Mr. Anderson there; that Mr. Anderson staid there the whole of the twenty-second of September, and that on the evening of that day he went with him across King's Ferry, as far as Crom pond, where they lodged, and in the morning proceeded with him about a mile beyond that place, where he left him, and that he came to General Arnold's that day, at Robinson's house, and dined with him. Mr. Smith, on being asked how the person he brought on shore was dressed, said that he had on a blue over-coat, and that he did not see his under clothes, but that, when he saw him in his house afterwards, he found that he had on the uniform of a British officer. On being asked whether Mr. Anderson was public in the house, and seen by the servants, he said no, that he was in an upper apartment, and that he himself, Mr. Smith, had carried him his breakfast and dinner. On being asked where Mr. Anderson had changed his clothes, he answered at his house, and that he had lent him one of his own coats. On being asked, whether he knew Mr. Anderson's rank and connection with the British army, or the conversation that passed between General Arnold and him, he declared he did not; but that he thought it was intelligence that General Arnold was receiving, of the greatest importance for the good of America. This was the idea, which Mr. Smith constantly held up, and declared that nothing should have induced him to have been acting in the matter, but a perfect conviction of its being a matter of the greatest importance to the good of his country. Mr. Smith was

asked, whether he did not advert to the impropriety of going on board a king's ship to obtain intelligence? He replied he did not at the time. He was strongly exhorted by the general, and other persons present, to make an ample confession of all the circumstances that he knew, which he declared he had done, and I do not recollect anything of importance more passing. There were present at this examination his Excellency, the Marquis de la Fayette, Colonel Harrison and Lieutenant Colonel Hamilton, and myself.[1]

"When his Excellency informed Mr. Smith that Major André, adjutant general of the British army was taken, did Mr. Smith say that he knew such a person?"

[1] Smith's account of this interview is characteristic: "After as much time had elapsed as I supposed was thought necessary to give me rest from my march, I was conducted into a room, where were standing General Washington in the centre, and on each side General Knox and the Marquis de la Fayette, with Washington's two aids-de-camp, Colonels Harrison and Hamilton. Provoked at the usage I received, I addressed General Washington, and demanded to know for what cause I was brought before him in so ignominious a manner? The general answered sternly, that I stood before him charged with the blackest treason against the citizens of the United States; that he was authorized, from the evidence in his possession, and from the authority vested in him by congress, to hang me immediately as a traitor, and that nothing could save me but a candid confession who in the army, or among the citizens at large, were my accomplices in the horrid and nefarious designs I had meditated, for the last ten days past. I answered, that no part of my conduct could justify the charge, as General Arnold, if present, would prove; that what I had done of a public nature was by the direction of that general, and, if wrong, he was amenable; not me, for acting agreeably to his orders. He immediately replied, 'Sir, do you know that General Arnold has fled, and that Mr. Anderson, whom you have piloted through our lines, proves to be Major John André, the adjutant general of the Britsh army, now our prisoner? I expect him here, under a guard of one hundred horse, to meet his fate as a spy, and, unless you confess who were your accomplices, I shall suspend you *both* on yonder tree,' pointing to a tree before the door. He then ordered the guards to take me away." Narrative, p. 51 — 53.

"Mr. Smith answered he did not."

"Did he discover any marks of surprise, when he was informed that John Anderson, whom he brought on shore from the Vulture, was adjutant general of the British army?"

"I did not discover any marks or change in his features or complexion."

"Do you recollect, in the course of the examination, that Mr. Smith was asked how he could reconcile Mr. Anderson's coming on shore in the room of Robinson, from the Vulture, to treat of matters relative to Robinson's estate; if you do, what was Mr. Smith's answer?"

"I do not, for I conceived that Mr. Smith thought the intention of Robinson coming on shore, was to give intelligence as well as Anderson."

"Did Mr. Smith say that he gave Mr. Anderson a coat of his own to change his dress, at the instance of General Arnold?"

"I do not recollect, that it was at the instance of General Arnold, but that it appeared a matter of evident propriety to conceal him from the country people, who, Mr. Smith observed, ought not to be acquainted with these things; by these things he meant the mode of obtaining intelligence."

"Did Mr. Smith mention where Mr. Anderson was going at the time he left him?"

"Mr. Smith conveyed the idea to us, that he fully understood Mr. Anderson, when he left him, was going to New York, for which purpose he had General Arnold's pass."

"Did Mr. Smith mention any information that

General Arnold had received from this Mr. Anderson, or that General Arnold told him that he had received from him?"

"Not a word. He said the conversation was totally unknown to him. I don't remember that the question was asked him, whether General Arnold had informed him of the intelligence he had received."

"Whether Mr. Smith said General Arnold gave him the character of this person as being a private person, or acting in a public capacity?"

"I don't remember that Mr. Smith said that General Arnold gave him a description of the person; but that General Arnold said the person would give him, General Arnold, material intelligence."

"Was this confession from Mr. Smith easily obtained from him, or did he discover a backwardness to make any?"

"I think easily, as to the general matter; the particulars of the coat, the carrying the breakfast and dinner, the being obliged to lodge at Crom pond, were drawn from him by questions; the answers to these questions were readily made."

"Had Mr. Smith gone through his account of his conduct in this affair on the general matter, previous to these questions being asked?"

"I think he had."

"Did General Washington, or either of the gentlemen who were present at Mr. Smith's examination, inform Mr. Smith that they were acquainted with his conduct, before he had an opportunity of giving this relation?"

"Yes."

"Did he appear to be much embarrassed when his Excellency, or one of the gentlemen present, acquainted him that he was acquainted with his conduct?"

"There was an embarrassment, but I knew not to what cause to attribute it."

"Did Mr. Smith, previous to his entering on his confession, make solemn protestations and appeals to heaven of his innocence and ignorance of General Arnold's criminal designs or intentions?"

"In the course of Mr. Smith's examination he made very solemn protestations, that he believed General Arnold was acting for the good of the country, or he should not have assisted him."

"Can you inform the court the time General Arnold went off to the enemy, and the time Mr. Smith was taken up?"

"General Arnold went off to the enemy about ten o'clock in the morning of Monday, the 25th of September last, but General Washington did not know it until four o'clock in the afternoon of that day. Colonel Gouvion was sent from Robinson's house to Fishkill, where it was understood Mr. Smith was, about ten o'clock that evening, to apprehend Mr. Smith; Colonel Gouvion returned before day, and Mr. Smith arrived between seven and eight o'clock on Tuesday morning under guard."

The Prisoner. Did you see me at Fishkill the Sunday evening preceding the Tuesday I was brought to Robinson's house?

"I saw you there that evening at General Scott's house, in company with Colonel Hawk Hay; Gen-

eral Washington was in company no part of the time I was with you, though he was in the house."

"Did my behavior that evening indicate a knowledge of any transaction that was injurious to my country?"

"No — you related a circumstance of the Vulture's being removed by some of our artillery firing on her, and that General Arnold was at your house, and was looking out of the window at that time, which circumstance, combined with others, was the cause of your being apprehended afterwards. The firing, it appeared, was just at day-light of the 22d of September last, the morning succeeding the night you were on board the Vulture."

The Court. Did Mr. Smith mention the names of the persons who carried him on board?

"He did not — the question I believe was not asked him, as it was expected that the names would have been found by the person superintending the boatmen at the ferry, as it was known that an order had been given by General Arnold to that person to supply Mr. Smith with a boat at any time he should call for it."

"Was General Washington at Fishkill when he heard of General Arnold's going off to the enemy?"

"No — he was at Robinson's house, and the matter was not generally divulged until the evening."

Colonel Hay, at whose house the prisoner was arrested, testified as to a conversation he had with Smith upon the subject of his arrest. The latter protested solemnly, that the only views he had in

going on board the Vulture, and bringing Anderson on shore, was to gain intelligence of importance and serve his country. The judge advocate here laid before the court certain papers which the prisoner admitted he once had in his possession, and the case on the part of the prosecution was closed. The prisoner then called and examined several witnesses in his defence.

Jonathan Lawrence, the first witness produced by the prisoner, on being asked whether he recollected Smith's general conduct in New York, previous to his leaving there, replied:

"I know but little of your political conduct while in New York, but it appeared to me your general character was in favor of the country."

"What has been my general conduct in the country since leaving New York?"

"At Dobb's Ferry I remember seeing you pass and repass as one of the convention of the state of New York. The convention was then sitting at Harlem. I was one who then guarded the ferry to examine passengers, and on examining you, you produced your credentials of being one of the convention."

"What has been my general character in the country since leaving New York?"

"Your general character was that you were a friend to the country, and from several conversations I have had with you within this twelve months you appeared to me to be so."

Jonathan Holcomb. Mr. Smith having desired me to purchase him two cattle in New England; on my return with the cattle, which was on Friday, the 22d September last, about four or five o'clock in the afternoon, I called upon Mr. Smith at his house and told him I had, in the droves back, his beeves coming on, and desired him to go into the road and see them. He told me that I might turn them into the pasture, that he would take them as I had purchased them, and not look at them. I insisted that he should go and look at them, and that if he was not pleased with them I would drive them on and receipt them. Mr. Smith declined going with me, and gave me for reasons, that he had been up the last night with a gentleman from New York at General Arnold's desire, to endeavor to procure a line of communication from New York to General Arnold, as we had had no news from there for some time, and the gentleman was then in his house, and Mr. Smith told me he expected the next morning to go with him to General Arnold's, and from there, if he went with him, for he appeared not determined to go, to Fishkill to his wife. The reason of his going to Fishkill was to get the keys from his wife, to get money to pay me for the beef.

The Court. Did Mr. Smith tell you by what means that gentleman came to his house?

"He did not."

The Prisoner. Did I make a secret of having a gentleman from New York at my house?

"You did not — you spoke of it frankly to me."

The Court. Did Mr. Smith inform you that Gen-

eral Arnold had had an interview with this gentleman at his house?

"They had an interview there the night before, as I understood Mr. Smith."

The Prisoner. Do you recollect my calling to my servant to get up my horse?

"I do."

The Court. Did you understand from Mr. Smith that he was present at the interview of General Arnold with the gentleman from New York?

"From what he said, I understood he was present, and that they had been in council together to procure a line of intelligence."

The Prisoner. Did I tell you I was present at the interview?

"No — but from what you said I conjectured so."

"Was what I informed you of, unasked by you?"

"I do not recollect asking you a single question about it."

The Prisoner to Colonel Hay. Do you remember asking me, on the road from Fishkill to Robinson's house, if I had ever wrote any treasonable letters to New York?

"I did ask you if you had wrote any treasonable or any other letters privately to New York — you said you had not."

"What was your reason for asking me this?"

"Colonel Gouvion informing me that there were persons taken up, that would prove you held a traitorous correspondence with the enemy."

"Did I not, on the road, complain much of my be-

ing taken in such a manner as I was, as I was conscious of no evil design against the country?"

"You did complain of the manner of your being taken and carried down, and said you thought yourself exceedingly ill used, after all your services to the country, and thanked God you were conscious of having done nothing that could deserve such treatment, and when you got to head quarters, said you would be very high about your treatment."

"Is it not double the distance from the point of the long Clove to Curn's Island, that it is from the point of the Clove to Taller's Point, in the North River?"

"I think it is nearly double the distance."

"Could you collect from my conduct, when first apprehended at Fishkill, any behavior in me, which conveyed to you an idea of my having done anything of a criminal nature?"

"I did not, for you ordered your boy to follow you with a horse down to Robinson's, for you said you expected to return the next morning."

"Were you present at a conversation which passed between Colonel Hamilton and myself at Robinson's house, after my examination before General Washington?"

"I was present at a conversation between you and Colonel Hamilton, but I do not know whether before or after your examination before General Washington."

"Don't you recollect my telling Colonel Hamilton, when pressed by him to inform of all I knew of Arnold's designs, that I had already told General Washington all I knew?"

"I do recollect you was pressed by Colonel Hamilton to tell all that you knew, and you said you had already told all that you knew, but I do not recollect you said, to General Washington. Colonel Hamilton, to induce you to tell all you knew, and to bring out the accomplices, promised to make use of his influence to get you a discharge, but said he was unauthorized to make such a promise, but he did it of his own accord."

"Do you think, from the confidential manner in which I related my transactions with General Arnold to you on the road, in order to obtain your opinion, that if there had been anything more in the compass of my knowledge, as far as my agency in this business extended, I should not have informed you of it, in order to obtain your advice?"

"I must confess I had some doubts about me that you had not told me the whole affairs, but after I was permitted to see you in Robinson's house, my begging of you for God's sake, for your wife's sake, and children's sake, to accept of Colonel Hamilton's promise, and divulge the whole secret, by your solemn appeals to the Almighty that you had told all you knew, and knew no more — I then believed that you had told the whole, and if you had known anything else I certainly should have got it out of you then."

"Do you recollect my telling Governor Clinton, that Sir George Rodney had detached six ships of the line, as a reinforcement to Admiral Greaves?'

"I do, and also recollect your mentioning it at Dr. McKnight's, the night we supped in company with

General Knox. This circumstance I forgot in my former examination."

"Please to relate to the court all you know of my political conduct in New York before our leaving it, and since, to this time, and what offices I filled in the state."

"Your character at New York stood very high as a whig. I have often heard you blamed for being too warm, and your running yourself into many imprudences, by your intemperate zeal. I remember, on the 6th of March, 1775, when the whigs and tories turned out, that you was extremely active on the whig side, and was the first person that introduced the bludgeons to the whigs, to knock the tories in the head, when they opposed a measure the whigs wanted to prosecute. Ever since your living in the country, you have been active in the American cause, and I had never reason to doubt your attachment. I always found you willing to turn out with the militia, and do everything in your power to promote the public good. You have been a member of the sub-committee of the county, and member of the provincial convention at the time independence was declared. In July, 1776, two ships and three tenders came up to Haverstraw, and attempted to land some men to carry off some stores. They came so much on a surprise, that the militia could not be collected. Only thirteen, you being one of the thirteen, went down to the landing, and notwithstanding the three tenders kept a continual firing, the thirteen men beat off five or six boats, crowded with men, and saved the stores."

Major Kierce. On the 21st of September last, General Arnold told me, when his barge returned from the continental village, with a barge that he sent for, to send it into Haverstraw creek, and to let him or Mr. Smith know by express by land, that the barge was sent into Haverstraw creek. I wrote a line to General Arnold, informing him that the barge was sent into the creek, and my express met the boy from General Arnold to me, and gave him my note, which was the reason I did not receive General Arnold's note to me.

"Were you informed for what purpose the barge was sent into the creek?"

"General Arnold informed me it was for Mr. Smith to go down the river, to get some intelligence in favor of America."

The Prisoner. Did you ever apply to me for money for the public use, and what station did you act in at the time?

"I applied to you last summer for money, being in great want of it to forward public despatches to and from the eastward, and you let me have one thousand dollars, and told me you could not let me have any more that time, and you should not want it before the fall, when you should want it to purchase some salt. I acted as quarter master at King's Ferry at the time. Mr. Henry, who had acted as quarter master at that place, also informed me you had let him have money for the public use.

"Did I not always discover to you a desire to advance the interest of the country, and promote the general cause of America?"

"You did, and bore with us the character of a warm friend to America."

The Court. Did Mr. Smith inform you that he had used the boat?

"No. I did not see Mr. Smith afterwards until he was coming from Fishkill after he was taken up."

The Prisoner. Did you hear Colonel Robinson was on board the Vulture?

"It was a common report at King's Ferry that he was on board."

The Court. Do you know whether Mr. Smith was employed by General Howe and General Arnold to get intelligence?

"General Arnold informed me, the afternoon of the night the boat was sent into the creek, that Mr. Smith had furnished General Howe with very good intelligence, and that he, Mr. Smith, was going down the river to procure intelligence for him, and desired me not to delay the boat a minute, but, as soon as it arrived, to send it into the creek."

Colonel John Lamb was next produced by the prisoner, who asked him the following questions.

"Do you know whether General Arnold received any letters from Colonel Beverly Robinson, by a flag, from on board the Vulture, and who informed you of it?"

"I was at the table at dinner (there were a number of other gentlemen present) with him at the time letters were brought in, and he said they came by a flag from Colonel Beverly Robinson; there was one he said for him, and another he said for General Put-

nam; he opened the one he said was for him, just looked at it, and put it up in his pocket."

"Do you know of General Arnold's receiving any more letters from Colonel Robinson?"

"I never heard of his receiving any more."

"Did he ever tell you, or read to you the contents of that letter?"

"He did not read the letter to me; he told me that Beverly Robinson had proposed an interview with him, and asked my advice on the subject. I advised him, as he was then going down to meet his Excellency, to show the letters from Beverly Robinson to him; and told him, as the proposal was of a very extraordinary nature, I could not conceive what views Beverly Robinson could have, in proposing such an interview. If anything he had to communicate was of importance to this country, he might do it by letter, but that if it was a matter that respected his own private concerns, his business would be with the governor of the state, not with the general commanding in the department, but that I supposed the latter was the case — that it was a matter of private concern respecting his estate; but I could not suppose what could be the motive, and told him the proposal was of such a nature, that it would induce a suspicion of an improper correspondence between him and Beverly Robinson, if there was an interview between them. I told him, that as he was going down to meet his Excellency at King's Ferry, I would advise him to show the letters to his Excellency, and take his advice how he should act. After he had an interview with his Excellency, I put the

question to him, to know if he had shown these letters to the general. He told me that he had, and that his Excellency's opinion respecting the matter exactly coincided with my own. I afterwards asked his Excellency if he had shewn him these letters, and he said that he had."

The Court. Did General Arnold mention to you the purpose of the interview?

"He did not."

The Prisoner. Did he not afterwards show you another letter from Robinson, in which Robinson promised to communicate to him intelligence of the utmost importance to America, if he might be restored to the re-possession of his estate.

"He did not, nor ever mentioned any such circumstance of such a proposal to me."

"Was that all the conversation, that you have mentioned, that passed between you respecting the letters Arnold had received?"

"It was."

"Did you know whether flags frequently passed between Arnold and the ship Vulture?"

"I never heard of a flag passing between him and the ship Vulture, until Arnold was gone off to the enemy."

"Were you stationed at the garrison at West Point, at the time Arnold told you of the interview proposed by Robinson."

"I was."

Major General Howe and several other American officers were examined by the prisoner, and testified

that he had been in the habit of furnishing intelligence to the Americans of the enemy; and that he always appeared to be a strong friend of liberty, although he was at one time regarded with suspicion on account of his family.

At this stage of the proceedings, all the evidence on both sides having been produced, the prisoner requested time to prepare his defence, and several days were allowed him for that purpose.[1] When the court assembled again, he read a long defence, which occupied a quire of paper. He again denied the jurisdiction of the court, contending that the resolve of congress, on which the charge against him was founded, could not abolish a fundamental principle established in any of the civil constitutions of the states in the union; that the exercise of the power, vested by this resolve, deprived the subject of the right of trial by jury, the great bulwark of individual freedom. He then urged, that General Arnold was actually a major general in the American service, at the very time he was engaged in the combination specified in the charge, and that he could not have had any agency, without the sanction and direction of Arnold; and the evidence clearly showed, that the whole proceedings of the prisoner were in obedience to the instructions of General Arnold. He also insisted, that the charge against him was in effect a charge of treason

[1] "Without any one as my counsel," says Smith, in his narrative, "I was compelled to enter on my defence, which I did with the more cheerfulness, from the candid and impartial manner in which the trial was conducted by the judge advocate, and the court-martial in general, but more particularly the president, Colonel Henry Jackson, of the town of Boston, in the Massachusetts state."

against the United States, requiring the strongest proof, and the testimony of two witnesses to each overt act. The prisoner then entered into a careful examination of the testimony in the case, and concluded with a solemn asseveration, that what he had declared to General Washington was strictly true; that he had no knowledge whatever of Arnold's real plans, but had acted throughout in good faith.

When the prisoner concluded his address, the court adjourned, and after holding one session for consideration, pronounced the following sentence: "The evidence produced on the trial and the prisoner's defence being fully and maturely considered by the court, they are of opinion, that notwithstanding it appears to them, that the said Joshua H. Smith did aid and assist Benedict Arnold, late major general in our service, who had entered into a combination with the enemy for the purposes which the charge mentions, yet they are of opinion, that the evidence is not sufficient to convict the said Joshua H. Smith of his being privy to, or having a knowledge of the said Benedict Arnold's criminal, traitorous and base designs. They are, therefore, of opinion, that the said Joshua H. Smith is not guilty of the charge exhibited against him, and do acquit him of it."

This decision of the court seems in accordance with the testimony. But the real connection of Smith with Arnold has never been satisfactorily explained. It is impossible to believe, that a man of his intelligence did not suspect something wrong in the proceedings; and his narrative, written many years afterwards, serves to strengthen the impression that he

was not acting in entire good faith. The troubles of Smith did not end with the trial. Indeed, he avers in his narrative, that he was not informed of the decision of the court martial until long after it was given, but was kept in constant suspense as to his fate, for many months. The papers were transmitted by Washington to the government of New York, that Smith might be tried by a civil process under the law of the state of New York, should such a course be deemed advisable. He was subsequently taken into custody by the civil authority of the state, but after being confined in jail several months, he found means to escape, by the assistance of his wife, and after various adventures, sometimes disguised in a woman's dress, he reached the city of New York, then in possession of the British. At the close of the war he went to England.

PROCEEDINGS

OF THE

GENERAL ASSEMBLY OF RHODE ISLAND,

AGAINST THE

JUDGES OF THE SUPERIOR COURT OF JUDICATURE,

FOR THEIR JUDGMENT IN THE CASE OF TREVETT AGAINST WHEEDEN, ON INFORMATION AND COMPLAINT FOR REFUSING PAPER BILLS FOR BUTCHER'S MEAT.

RHODE ISLAND, 1786.

The case of Trevett *v.* Wheeden and the proceedings of the general assembly against the judges, involved important principles, and deeply agitated the state of Rhode Island. The arguments of James M. Varnum, who was of counsel for the judges, were regarded as most able and eloquent productions, and he was induced to prepare them for the press, together with a succinct account of the whole controversy, soon after it took place. The arguments, as written out, are not equal to their reputation, but are nevertheless worthy of preservation in these pages. The title of General Varnum's work was as follows: — "The Case of Trevett against Wheeden, on information and complaint, for refusing paper bills in payment for butcher's meat, in market, at par with specie. Tried before the honorable superior court, in the county of Newport, September term, 1786. Also, the Case of the judges of said court, before the honorable general assembly, at Providence, October session, 1786, on citation, for dismissing said complaint. Wherein the rights of the people to trial by jury, &c., are stated and maintained, and the legislative, judiciary and executive powers of government examined and defined. By James M. Varnum, Esq., major general of the state of Rhode Island, &c., counsellor at law, and member of congress for said state. Providence: printed by John Carter, 1786." In addition to this work, there are many interesting facts relating to the case, in the Memoirs of the Rhode Island Bar, by Wilkins Updike.

THE RHODE ISLAND JUDGES.

The period immediately succeeding the American revolution was the most gloomy in our history. The country was exhausted by a protracted contest of seven years, and, on the restoration of peace, there were found to be causes of discontent in many of the states, which threatened to embroil the citizens in sanguinary domestic dissensions. The army, unpaid and discontented, had returned to their homes, amongst a population as impoverished as themselves, and the whole people were subjected to burdensome taxes to meet a mass of debt, which had been accumulated in the course of the war. The restlessness produced by the uneasy situation of individuals, connected with lax notions concerning public and private faith, and erroneous opinions which confound liberty with an exemption from legal control, produced a state of things, which alarmed all reflecting men, especially as a division of property was more than

hinted at, on the ground that what had been protected by the joint exertions of all, ought to be common to all.[1]

Moreover, the usual consequences of war were conspicuous in the emulation which prevailed in the maritime towns, among men of fortune, to exceed each other in the display of their riches, and in the utter neglect of those principles of diligence and economy, which are essential to the stability of a free government; whilst the discipline and manners of the army had vitiated the taste, and relaxed the industry of the whole people. Of this disposition in the citizens for luxuries, the merchants naturally took advantage, and large importations of foreign manufactures drained the country of the precious metals, thus "furnishing reluctant debtors with an apology for withholding their dues, both from individuals and the public." The discontent, attendant upon such a state of things, was peculiarly active in New England, because their fisheries had become unproductive, and soon became manifest, first, in unlicensed conventions, which arrayed themselves against the legislature, denouncing the heavy taxes and the administration of the laws, and, at length, in open resistance to the constituted authorities.

[1] The state debt of Massachusetts, when consolidated, amounted to upwards of thirteen hundred thousand pounds, besides two hundred and fifty thousand pounds due to the officers and soldiers of their line of the army. Their proportion of the federal debt, was not less, by a moderate computation, than one million and a half of the same money. And, in addition to this, every town was embarrassed, by advances which they had made to comply with the repeated requisitions for men and supplies to support the army, and which had been done upon their own particular credit. Minot's History of the Insurrection, 5.

In August, 1786, a convention of delegates from fifty-one towns in the county of Hampshire, in Massachusetts, met at Hatfield, and voted a great number of articles as grievances and "unnecessary burdens now lying on the people;" and gave directions for transmitting these proceedings to the convention of Worcester, and to the county of Berkshire. Very soon after, a number of insurgents, supposed to be nearly fifteen hundred, assembled under arms at Northampton; took possession of the court house; and effectually prevented the sitting of the courts of common pleas and general sessions of the peace. The governor issued a proclamation, calling on the officers and citizens of the commonwealth to suppress such treasonable proceedings; but it had little effect. The counties of Worcester, Middlesex, Bristol and Berkshire, were set in a flame. In the week succeeding the proclamation, a body of more than three hundred insurgents posted themselves at the court house in Worcester, and obliged the courts of common pleas and general sessions to adjourn. Insurgents in Middlesex county prevented the courts from sitting at Concord. In the county of Bristol, the malecontents assembled to prevent the sitting of the courts at Taunton; but the people, to the number of three hundred, appearing in arms under Major General Cobb, counteracted their designs.

On the 23d of November, a convention of delegates from several towns in the county of Worcester sent out an address to the people. An attempt was at length made to prevent the sitting of the supreme judicial court, by a number of insurgents headed by

Daniel Shays, who had been a captain in the continental army, but had resigned his commission. The general court, at this distressing period, passed three laws for easing the burdens of the people: an act for collecting the back taxes in specific articles; an act for making real and personal estate a tender in discharge of executions and actions commenced at law; and an act for rendering law processes less expensive. They provided for the apprehending and trial of dangerous persons; but at the same time tendered pardon to all the insurgents. These lenient measures of government were ascribed, not to clemency, but to weakness or timidity. The judicial courts being adjourned by the legislature to the 26th of December, to sit at Springfield, Shays with about three hundred malecontents marched into that town to oppose the administration of justice, and took possession of the court house. A committee was appointed to wait on the court, with an order, couched in the humble form of a petition, requiring them not to proceed on business; and both parties retired.

The disposition to insurgency was not confined to Massachusetts. On the 20th of September, about two hundred men, armed in different modes, surrounded the general assembly of New Hampshire, convened at Exeter, and held the whole body prisoners several hours; but the citizens, appearing in arms, crushed the insurrection there in its infancy. The object of the insurgents was, to force the legislature into a paper money system, agreeably to a petition, which had been previously preferred by a convention of delegates from about thirty towns in

that state. The president, in a cool and deliberate speech, explained to the insurgents the reasons for which the assembly had rejected the petition; exposed the weakness and injustice of their request; said, if it were ever so proper, and the whole body of the people were in favor of it, yet the legislature ought not to comply with it, while surrounded by an armed force; and declared, that no consideration of personal danger would ever compel the legislature to violate the rights of their constituents. When his speech was finished, the drum beat to arms; as many as had guns were ordered to load them with balls; sentries were placed at the doors; and death was threatened to any person who should attempt to escape until their demands were granted. This insult to the legislature was beheld in silence until the dusk of the evening, when some of the inhabitants of Exeter beat a drum at a distance, and others cried, "Huzza for government! Bring up the artillery." The sound of these words struck the mob with an instant panic, and they scattered in every direction. They collected the next day; but the president, having called out the force of the state, soon dispersed them. Some were taken prisoners. Eight were arraigned at the superior court on an indictment for treason; but no one suffered capital punishment.[1]

In Rhode Island these restless spirits seem to have obtained possession of the government, and they proceeded to make some of the most extraordinary laws

[1] Holmes's American Annals, ii. 353, 359.

ever known in a civilized community. The distress attendant upon the exportation of the precious metals was charged upon the merchants, who were regarded with the greatest acrimony by a large majority of the people. An idea became prevalent, that paper money might be forced, by legislative authority, to take the place of gold, and measures were adopted to carry out this policy to the utmost extent by the strong arm of the law — it being supposed that the merchants were the only class that would be injuriously affected thereby, or that would make any strenuous opposition.

The subject of the currency, one of the most difficult and embarrassing in the whole science of political economy, is more exposed to the assaults of ignorance and the arts of the demagogue than any other; and experience shows, that in all free governments, the greatest errors are sometimes embraced by the people, and a course of policy persisted in, which must inevitably result in disaster and ruin. In Rhode Island, at the period referred to, the distresses of the people were seized upon by unprincipled men, who, by artful appeals to the distressed of every class, roused them to frenzy against the merchants, and induced them to entertain the false and delusive hope, of being able to change their condition by simple acts of legislation. The state was distracted by two parties, calling themselves the *hard* and *paper money* parties. In 1786, the latter obtained an overwhelming majority in the state, and in May of that year, the general assembly proceeded to make

certain laws, which were at once indicative of fraud, ignorance and folly.

The first act on this subject, after reciting that, from a variety of causes, political and mercantile, the currency of the state had become altogether insufficient in point of quantity for the purposes of trade and commerce, and for paying the just debts of the inhabitants, provided for the emission of one hundred thousand pounds in bills of paper, for the period of fourteen years, to be lent on the credit of clear landed real estates, at the rate of four per centum per annum. Committees were appointed throughout the state, to sign and distribute these bills to the towns, in proportion to their population. Persons receiving them were to pay the interest into the general treasury of the state, annually, for seven years; but the last seven years no interest was to be paid; and one seventh part of the sum so issued was to be paid into the office of a general committee in seven equal annual payments during the last seven years, "to be consumed by fire."[1] The bills were to be issued in a convenient form, not more than three pounds in value, nor less than sixpence. This money was to be a lawful tender for all debts, and in case any person refused to receive it as such, his debt was to be forever barred upon proper proceedings had by the debtor. No time was fixed for the redemption of these bills,

[1] The form of these bills was as follows; — State of Rhode Island, &c. This bill is equal to in lawful silver money, and shall be received in all payments within this state, agreeable to an act passed by the general assembly of said state, at their May session, holden at the city of Newport, A. D. 1786. Death to counterfeit.

nor was their ultimate payment charged upon any fund. Indeed, it was not designated how they were to be paid, and it is hardly necessary to say, that they fell into immediate discredit.

At the next June session, the assembly passed another act on the subject. The preamble set forth that "whereas it is highly necessary, and of the last and most important consequence to the government of all states, that the proceedings of the legislature be held in high estimation, and the most sacred regard; and that the law when promulgated be strictly adhered to, and punctually and most religiously obeyed. And whereas it is of the greatest moment, that the aforesaid emission of one hundred thousand pounds, which will have the greatest tendency of anything within the wisdom of this legislature to quiet the minds and to alleviate the distressed situation and circumstances of the good citizens of this state, should be kept in good credit; and that the same should be a currency equal in value to coined gold and silver: And whereas various attempts have been made by a certain class of men, who, from mistaken principles, suppose the said currency to be injurious to their interest, and from an inclination to render invalid such laws and regulations of this assembly, as may not quadrate with their interest, judgment and opinion of things, and for many other causes, which, if permitted to exist, will support a power in this state counter to the authority chosen and appointed by the suffrages of the free people thereof, and subversive of those laws and principles upon which the happiness, welfare and safety, of the

people depend." It then provided that any person who should refuse to take these bills of credit in exchange for any articles which he might have for sale, according to the amount expressed on the face of such bills, or make any difference in the prices between silver and paper money in any sale or exchange, or direct the same to be done; or in any manner whatever tend or attempt to depreciate or discourage the passing of such bills, of the price of the face thereof, or do any act to invalidate or weaken the act emitting such bills, for the first offence should forfeit and pay the sum of one hundred pounds, and be rendered incapable of being elected to any office of honor, trust, or profit within the state.

This measure met with no better success than the other; but its failure did not convince a majority of the people, that legislative enactments could not transmute paper into gold, and they were more than ever determined to create, by the mere force of law, a confidence in a worthless paper currency. Accordingly, at a session of the general assembly, specially convened by the governor, in August following, one of the most extraordinary laws ever imposed on a free people, was passed by the general assembly. The preamble set forth, "that it is an established maxim of legislation, and ought to be strictly and punctually adhered to in all wise governments, that process upon the breach of penal laws should be immediate, and the penalty inflicted or exacted directly consequent upon conviction. And

that the usual and stated times of holding courts within this state, are impracticable, inconvenient and inapplicable to the true intent and meaning of said act; and altogether insufficient to carry into effect the good purposes of this legislature, touching the same." It was then enacted that if any person refused to receive such bills as coin, according to previous laws, the complainant should apply to either of the judges of the superior court of judicature or inferior court of common pleas, and citation should be issued to the refusing party, to appear before a special court within three days, and there stand his trial, without a jury, according to the laws of the land, before such court. And the judgment of the court, upon the conviction of the accused, was to be forthwith executed, and the offender immediately to pay the penalty, or stand committed to jail until sentence should be performed; which judgment was to be final and conclusive, and without appeal. No delay, protection, privilege or injunction should, in any case, be prayed for, allowed or granted.

At the same session, a bill passed the house of representatives, which was sent out to be submitted to the freemen, at their town meetings. This bill contained a criminal provision for refusing to take the bills at par with gold and silver, and also a test, whereby all the freemen of the state and others, were required to swear or affirm, that they would use their endeavors to give the paper money a currency equal to gold and silver, and that they would sell their vendible articles for the same prices for the one as

the other. In case of failure, the delinquent was to be punished as for wilful and corrupt perjury.[1]

But the proceedings of the general assembly received a sudden and effective check, in the firmness of the judiciary, who refused to coöperate in these insane measures. In September, 1786, one John Trevett, of Newport, having purchased in the market some meat of John Wheeden, a butcher, tendered him in payment bills of the emission of May preceding. The butcher refused them, whereupon a complaint was filed in accordance with the laws, before Paul Mumford, chief justice of the superior court, at his chambers, who caused a special court to be convened, but as the information was filed during the term, it was referred to the regular sittings of the court, for determination under the provisions of the paper money laws.

The defendant appeared in court, and pleaded, "that it appears by the act of the general assembly, wherein said information was founded, that the act had expired, and hath no force. Also, for that by said act the matters of complaint are made triable before special courts, uncontrollable by the supreme judiciary court of the state. Also, for that the said court is not, by said act, authorized and empowered to empanel a jury, to try the facts charged in the information, and so the same is unconstitutional and void."

[1] Upon the publication of this bill, the citizens of Providence, in town meeting, unanimously instructed their representatives to vote against it. An able report was drawn up, which exerted a favorable influence on the public mind. Updike, 175.

The case came on for a hearing at the September term of the superior court of judicature for the county of Newport, 1786, before Paul Mumford, chief justice, Joseph Hazard, Thomas Tillinghast and David Howell, associate justices. James Mitchell Varnum and Henry Marchant,[1] the most eminent counsellors in Rhode Island, were retained for the defendant. Varnum was regarded as the ablest lawyer of that day, and had great influence with the friends of law and order throughout the state. Early in the revolutionary struggle, he was chosen a brigadier general by congress, and was in active service more than a year, when he resigned his commission, but was elected a major general of the militia of the state, and held that rank during the remainder of his life. He was also chosen a member of the continental congress, in 1780. After the war, he resumed the practice of his profession, in which he met with great success. In appearing on the present occasion, Varnum acted as much in accordance with his own desires, as the welfare of his client. His argument, although not wanting in strength, is clothed in an ungraceful style, and is deficient in good taste and sound discrimination. It by no means justifies the praise it received at that day, and, to the modern

[1] Henry Marchant was a native of Martha's Vineyard. He was born in 1741, and studied law with Judge Trowbridge, in Cambridge. He established himself in Newport, Rhode Island. In 1770 he became attorney general of the colony. In 1777 he was a delegate to the continental congress, and continued there three years, when he declined serving longer. On the organization of the government under the constitution, he was appointed by Washington judge of the district court for Rhode Island, and remained in that office until his death, in 1796.

reader, adds nothing to the reputation of this distinguished lawyer. Perhaps the explanation of this may be found in the fact, that the argument was reduced to writing, after the excitement which produced it had died away; and it is still more probable, that the emphatic success of the advocate, on the occasion referred to, lent a charm to his address, which time could not preserve. At any rate, it is worthy of preservation in these pages, as connected with one of the most interesting points in our domestic history.[1]

ADDRESS OF JAMES M. VARNUM.

I do not appear, may it please the honorable court, upon the present occasion, so much in the line of my profession, as in the character of a citizen, deeply interested in the constitutional laws of a free, sovereign, independent state. And, indeed, whenever the rights of all the citizens appear to be essentially connected with a controverted question, conscious of the dignity of man, we exercise our legal talents only as means, conducive to the great end of political society, general happiness. In this arduous, though pleasing pursuit, should my efforts appear too feeble

[1] General Varnum was born in Dracut, in 1749. He was graduated at the Rhode Island College, now Brown University, in 1769, and, having studied law with Oliver Arnold, of Providence, established himself in East Greenwich. He entered the army at the age of twenty-seven, but resigned his commission at the age of thirty-one, and was elected to congress. In 1787 he was appointed a judge of the superior court of the Northwestern Territory, and was induced to leave his family and friends to become a pioneer in the West, but his health had become enfeebled, and he died at Marietta, on January 10, 1789.

to support the attempt, I shall derive a consolation in reflecting, that the learned and honorable gentleman at my right is with me in the defence.

Well may a profound silence mark the attention of this numerous and respectable assembly! Well may anxiety be displayed in every countenance! Well may the dignity of the bench condescend to our solicitude, for a most candid and serious attention, seeing that, from the first settlement of this country until the present moment, a question of such magnitude as that upon which the judgment of the court is now prayed, has not been judicially agitated!

Happy am I, may it please your honors, in making my warmest acknowledgments to the court, for permitting the information and the plea to be considered by them, in their supreme judiciary capacity. By this indulgent concession, we feel ourselves at liberty to animadvert freely upon the illegality of the new-fangled jurisdictions, erected by the general assembly, in the act more immediately in contemplation. The embarrassments naturally accompanying a plea to the jurisdiction, by removing the cause from the special court into this court, are totally removed; and, with them, the painful necessity of considering your honors as individually composing so dangerous a tribunal. The idea of that necessity is truly alarming, and we cannot do justice to our own feelings, without expressing a fervent wish, that it may hereafter be ever banished from the human breast.

In discussing the several points stated in the plea, we must necessarily call in question the validity of the legislative act, upon which the information is

grounded. We shall attempt most clearly to evince, that it is contrary to the fundamental laws of the state, and therefore, as the civilians express it, a mere nullity, and void, ab initio. We shall treat, with decent firmness, upon the nature, limits and extent, of the legislative powers; and deduce, from a variety of observations and authorities, that the legislature may err, do err; and that this act, if we confine ourselves to the subject matter of it, can only be considered as an act of usurpation; but having been enacted by legislators, of whose integrity and virtue we have the clearest conviction, and of whose good intentions we have not a doubt, it will be viewed as an hasty resolution, inconsiderately adopted, and subject to legal reprehension.

The parties named in the process are of no further consequence, than as the one represents the almost forlorn hopes of an hitherto disappointed circle; the other as a victim; the first destined to the fury of their intemperate zeal and political frenzy. Why should the abettors of this salutary act, as many are pleased to call it, retire behind the curtain, in the day of trial, unless something within them declares that all is not right? Or, dare they not appear in the character of informers? Why should their artillery be levelled against an unfortunate man, who, not three weeks since, was an object of charity in the streets of Newport; and now, "poor pensioner upon the bounties of an hour," is called upon to answer, criminally, for refusing beef at fourpence the pound, when it cost him sixpence upon the hoof, although purchased of some of the most influential promoters

of the present measures? Were they dubious of the event, or did they feel a reluctance in attacking gentlemen of business, character and fortune, who daily and openly trample upon this favorite idol? Were they not acquainted with a Gibbs, and are they not intimately connected with a Cooke?

Incomparable was the sentiment of a fine writer, "that in a democratical government, the customs and manners control the laws." And whenever an attempt is made, to force upon the people a system repugnant to their principles, and at which every sentiment of integrity must reluct, the authors themselves, however sanguine in their hopes, will ever betray an instability in the execution, that generally forebodes disappointment and chagrin. To your honors, however, it is submitted to determine, how far the observation will apply to the cause on trial. The peace, the honor, the safety of the state, depend upon, and the fate of unborn millions may be affected by it.

The first point to which we solicit the attention of the honorable court is, that the act of the legislature, upon which the information is founded, hath expired. In the preamble to this act it is stated, "that the usual and stated methods and times of holding courts within this state are impracticable, inexpedient, and inapplicable to the true intent and meaning of the said act (the act inflicting the hundred pounds penalty) and altogether insufficient to carry into effect the good purposes of this legislature, touching the same." Then follows: "Be it enacted, that the mode of procedure, and the method of law process, against

any person or persons who shall be guilty of a breach of the aforesaid act, &c., shall be as followeth." Hence, it is evident, that the principal aim in this act, is so to modify and vary the process, as to enforce the sanctions of the former; lessening, however, the fine, to render prosecutions more familiar and practicable. Examine the act with the most critical exactness; there is not a clause in it which creates a crime, or defines or qualifies an action, so as to infer the idea of criminality. Observe therefore a subsequent clause, which enacts, "that the legal mode of carrying the afore-recited act into execution shall be in force fully and completely, for every purpose therein mentioned and contained, until all offences, which have been committed and complained of, and which may be committed and complained of, until the expiration of ten days after the rising of this assembly, may be fully heard, tried and determined; anything in this act to the contrary in anywise notwithstanding." What then hath become of the legal mode, pointed out in the act, since the expiration of the ten days therein mentioned? What other legal mode, than that in question, is taken notice of? That is the only antecedent to the limiting clause; at least, it is the last antecedent; and so grammatically, as well as legally, is intended to continue in force the said space of ten days. "The legal mode" "shall be in force" "until the expiration of ten days;" consequently, at the expiration of ten days there was an end of it.

For penal statutes are to be construed strictly; not only with regard to the crime and the penalty, but

also with respect to the process; more especially, when the manner of trial is repugnant to the common law. I am sensible that statutes, made pro publico bono, (not malo, as in the present instance,) claim a liberal construction. Of that kind may be deemed, in legal contemplation, the emitting act, whereby it may be supposed that the means of commerce and other business are enlarged; but this act and the former penal act becoming one, are altogether penal. They are not directed to the public good, nor are they so formed as to be entitled to liberal construction.

Should it be objected, that this construction would manifestly oppose and frustrate the general intent of the legislature; I answer, the courts of law will endeavor to establish the actual meaning of the legislature, if not opposed by a plain, legal construction; but as they are sworn to judge according to law, they cannot depart from this rule of decision.

But, may it please your honors, we do not place our principal reliance upon this objection, although in legal propriety we might safely meet the consequences. The whole frame of the act is so replete with blunders, contradictions and absurdities, that not a trace of law-learning can be discovered in it. And to the honor of those of the professional gentlemen, who prefer the good of their country to the paltry gains of business, they had not anything to do with it; nor any one else who understood, or, if he understood, duly considered what he was about.

We now proceed to the second point stated in the plea, "that by the act of the legislature, special trials

are instituted, incontrollable by the supreme judiciary court of the state." There are, in all free governments, three distinct sources of power, the legislative, the judiciary and executive. The judiciary power is more or less perfect, as the formation of the courts of law tends to produce certainty and uniformity in legal determinations. And, indeed, without certainty and uniformity in the judicial tribunals, the best possible system of laws will prove entirely inadequate to the security of the people. For law itself is but a rule of action; and consequently its very existence is destroyed, when contradictory decisions are admitted upon the same point. From hence may clearly be inferred the necessity of a supreme judiciary court, to whose judgments, as the only conclusive evidence in law questions, all subordinate jurisdictions must conform. Such is the court before which I now have the honor of appearing. Into the nature and extent of whose jurisdiction, permit me, with humble deference, to inquire.

In the charter, granted by king Charles the Second, it is granted, to the governor and company, when convened, in their legislative capacity, "to appoint, order and direct, erect and settle, such places and courts of jurisdiction, for the hearing and determining of all actions, matters and things, within the said colony and plantation, and which shall be in dispute, and depending there, as they shall think fit; and also to distinguish and set forth the several names and titles, duties, powers and limits, of each court, office and officer, superior and inferior." In consequence whereof, the general assembly, in the year

1729, established this court in its present form, "a superior court of judicature, court of assize, and general gaol-delivery, over the whole colony, for the regular hearing and trying all pleas, real, personal and mixed, and all pleas of the crown." That they shall have "the same power and authority, in all matters and things in this colony, as the court of common pleas, king's bench, or exchequer, have, or ought to have, in that part of Great Britain heretofore called England, and be empowered to give judgment in all matters and things before them cognizable, and to award execution thereon."

This establishment has never been varied, nor the jurisdiction of the court diminished. The powers annexed to it were derived from the charter, from our original constitution; and, by an uninterrupted exercise, have become matters of common right. In point of antiquity, we find them existing, in full vigor, in the earliest periods of which we have any regular traces of the English constitution. It is unnecessary, however, to look any further back than to the Norman reigns, when justice was exercised in one court, called the "aula regis;" "out of this court, the courts of common pleas and exchequer seem to have been derived, some time before the making of the statute of Magna Charta; the former of which courts properly determines pleas merely civil, and the latter those relating to the revenue of the crown. And after the erection of these courts, the supreme court seems, by degrees, to have obtained the name of the court of king's bench, and hath always retained a supreme jurisdiction in all criminal matters."

The extent of these powers is well defined by the author last referred to, as well as by most of the writers upon the subject. "There is no doubt but that this court, being the highest court of common law, hath not only power to reverse erroneous judgments, given by inferior courts, but also to punish all inferior magistrates, and all officers of justice, for all wilful and corrupt abuses of their authority."

It commands, prohibits and restrains, all inferior jurisdictions, whenever they attempt to exceed their authority, or refuse to exercise it for the public good, or upon the application of individuals. There are many instances, I must confess, in which no appeal is allowed from other courts to this court; and in such cases it will not interpose its supreme control, unless the other courts exceed their authority, or otherwise, as before mentioned.

Let us illustrate the subject by reflecting, for a moment, upon the establishment of our courts of general sessions of the peace. They are five in number, corresponding to the five counties of the state. They have cognizance of all crimes not capital, arising within their respective districts, and their jurisdictions are perfectly equal. Suppose them exercising their legal judgments upon the same law; and that this law is of a complicated nature, admitting of different constructions, both in the definition of the crime, and the mode of punishment: May we not, must we not, conclude, that the same law would have different operations in the different counties? Hence arises the necessity of a supreme control, of a common standard, to which the opinions of these five

judicatories shall be conformable. The citizens are entitled not only to liberty, arising from the security which the laws afford, but they are equally entitled, and entitled to equal liberty. They must, therefore, they will apply to one tribunal, as to a focal point, where the knowledge of the law is concentred, and from whence its voice will be heard with irresistible conviction, confirming the principles of universal equality.

Had the cognizance of informations been confined to the courts of sessions only, the evil might have been remedied, without appeal, by writs of certiorari, prohibition, mandamus and procedendo; but by an unheard of arrangement in the special jurisdictions, the judges of this court are precisely upon a level with those of the sessions. Their jurisdiction is concurrent, cumulative and equal. Consequently there would not be a propriety in applying to this court, in their supreme judicial capacity, to correct the errors and restrain the excesses that might arise from oppressive determinations. For in the second, they might counteract their first deliberations, or refuse to grant redress: but by their first decisions, as a special court, a legal prejudice would naturally be formed in the minds of the judges individually, which might totally obstruct the avenues to justice. The pride of opinion is more or less prevalent in all men, however exalted their stations; and however conformably the intention may be to the principles of rectitude, the judgment will be biased by preëxisting opinions.

Making every possible concession for the sake of the argument, the supreme judiciary court could only

correct the errors of its own judges, determining in the special court; and therefore the extravagancies that might accompany the proceedings of the other five courts, could not, in any possible case, be reprehended.

May it please your honors,

As all the glory of the solar system is reflected from yonder refulgent luminary, so the irradiations of the inferior jurisdictions are derived from the resplendent control of this *primum mobile* in the civil administration. Under its genial influence, therefore, we beg liberty to consider the last point submitted to the judgment of the court, "that by the act of the legislature the court is not authorized or empowered to empanel a jury for trying the facts complained of in the information."

The proposition cannot be controverted: The expressions in the act, "that the majority of the judges present shall proceed to hear, &c. without any jury," do not require a comment. Should it be objected that this clause of the act only empowers the judges to try the fact, when the parties will agree to waive the trial by jury, it will be sufficient to answer, that the general assembly intended directly the contrary. It is well known by all present, that on one day this clause was rejected, but on the day following (in consequence of a nocturnal *imperium in imperio*, or convention of part of the members) a motion was made for receding, and they did recede accordingly. The general tenor of the act was so repugnant to the honest feelings of the people, when excited by sober reflection, that the junto out of doors, and possibly

some leading men within, were apprehensive that convictions would not take place in the usual mode of trial. They aimed therefore at a summary process, flattering themselves that the judges, being elected by the legislators, would blindly submit to their sovereign will and pleasure. But, happy for the state, our courts in general are not intimidated by the dread, nor influenced by the debauch of power!

This part of the subject, and which is by far the most important, will require a more ample discussion than the preceding. I must therefore beg the attention of the honorable court to the following considerations; that the trial by jury is a fundamental right, a part of our legal constitution; that the legislature cannot deprive the citizens of this right; and that your honors can, and we trust will, so determine.

By the Great Charter of Liberties,[1] which was obtained sword in hand from King John; and afterwards, with some alterations, confirmed in parliament by King Henry the Third, his son, which charter contained very few new grants; but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards, by the statute called *Confirmatio Cartarum*, whereby the Great Charter is directed to be allowed as the common law, all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of

[1] Blackstone's Commentaries on the Laws of England, i. 127, 128.

excommunication is directed to be constantly denounced against all those that by word, deed or counsel, act contrary thereto, or in any degree infringe it. Next by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two) from the First Edward to Henry the Fourth. Then, after a long interval, by the petition of right; which was a parliamentary declaration of the liberties of the people, assented to by King Charles the First in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the habeas corpus act, passed under Charles the Second. To these succeeded the bill of rights, or declaration delivered by the lords and commons to the prince and princess of Orange, February 13, 1688; and afterwards enacted in parliament, when they became king and queen: which declaration concludes in these remarkable words: "And they do claim, demand, and insist, upon all and singular the premises, as their undoubted rights and liberties." And the act of parliament itself recognises "all and singular the rights and liberties, asserted and claimed in the said declaration, to be the true, ancient and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted, at the commencement of the present century, in the act of settlement, whereby the crown was limited to his present majesty's illustrious house, and some new provisions were added at the same fortunate era, for better securing

our religion, laws, and liberties; which the statute declares to be "the birthright of the people of England;" according to the ancient doctrine of the common law. The same elegant writer, who appears to possess the highest degree of information in legal history, observes, when speaking of this palladium of liberty, that "it is a trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof. Some authors have endeavored to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is, that they were in use among the earliest Saxon colonies, their institution being ascribed by Bishop Nicholson to Woden himself, their great legislator and captain. Hence it is, that we may find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France, and Italy; who had all of them a tribunal composed of twelve good men and true, '*boni homines*,' usually the vassals or tenants of the lord, being the equals or peers of the parties litigant: and, as the lord's vassals, judged each other in the lord's courts; so the king's vassals, or the lords themselves, judged each other in the king's court. In England we find actual mention of them so early as the laws of King Ethelred, and that not as a new invention. Stiernhook ascribes the invention of the jury, which in the Teutonic language is denominated *nembda*, to Regner, king of Sweden and Denmark, who was cotemporary with our king Egbert: just as we are apt to impute the invention of this, and some other pieces of juridical polity, to the superior genius of Alfred the

Great; to whom, on account of his having done much, it is usual to attribute everything: and as the tradition of ancient Greece placed to the account of their one Hercules whatever achievement was performed superior to the ordinary prowess of mankind. Whereas the truth seems to be, that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other. Its establishment however and use, in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battel, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In Magna Charta it is more than once insisted on as the principal bulwark of our liberties: but especially, by cap. 29, that no freeman shall be hurt, in either his person or property, 'nisi per legale judicium parium suorum vel per legem terræ.' A privilege which is couched in almost the same words with that of the emperor Conrad, two hundred years before: 'Nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum, et per judicium parium suorum.' And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature."

From these passages in Judge Blackstone's Commentaries, from the variety of authorities to which he refers, and from many others of the greatest reputation, it most clearly appears, that the trial by jury was ever esteemed a first, a fundamental, and a most

essential principle, in the English constitution. From England this sacred right was transferred to this country, and hath continued, through all the changes in our government, the firm basis of our liberty, the fairest inheritance transmitted by our ancestors.

The settlers in this country, from whom we are descended, were Englishmen: they gloried in their rights as such: but being persecuted in matters of religion, over which no earthly tribunal can have the control, they bravely determined to quit their native soil, to bid a final adieu to the alluring charms of their situation, and commit their future existence to that Almighty Power, whose authority they dared not infringe, but in whose protection they could safely confide. They tempted the foaming billows, they braved, they conquered the boisterous Atlantic, and rested in a howling wilderness, amidst the horrid caverns of the untamed beasts, and the more dangerous haunts of savage men. They retained their virtue, their religion, and their inviolable attachment to the constitutional rights of their former country. They did not withdraw or wish to withdraw themselves from their allegiance to the crown, but emigrated under a solemn assurance of receiving protection, so far as their situation might require, and other circumstances render practicable.

The laws of the realm, being the birthright of all the subjects, followed these pious adventurers to their new habitations, where, increasing in numbers, amidst innumerable difficulties, they were formed into colonies by royal charters, in the nature of solemn compacts, confirming and enlarging their privileges.

In the charter granted to our forefathers, the following paragraph claims our particular attention: "That all and every the subjects of us, our heirs and successors, which are already planted and settled within our said colony of Providence Plantations, which shall hereafter go to inhabit within the said colony, and all and every of their children, which have been born there, or on the sea going thither, or returning from thence, shall have and enjoy all liberties and immunities of free and natural subjects, within any of the dominions of us, our heirs or successors, to all intents, constructions and purposes whatsoever, as if they, and every of them, were born within the realm of England."

This concession was declaratory of, and fully confirmed to the people the Magna Charta, and other fundamental laws of England. And accordingly, in the very first meeting of the general assembly, after receiving the charter, in the year one thousand six hundred and sixty-three, they made and passed an act, "declaring the rights and privileges of his majesty's subjects within this colony," whereby it is enacted, "that no freeman shall be taken or imprisoned, or be deprived of his freehold or liberty, or free customs, or be outlawed, or exiled, or otherwise destroyed, nor shall be passed upon, judged or condemned, but by the lawful judgment of his peers, or by the laws of this colony: and that no man, of what estate or condition soever, shall be put out of his lands and tenements, nor taken, nor imprisoned, nor disinherited, nor banished, nor any ways destroyed, nor molested, without for it being

brought to answer by due course of law. And that all rights and privileges, granted to this colony by his majesty's charter, be entirely kept and preserved to all his majesty's subjects, residing in or belonging to the same."

This act, may it please the honorable court, was not creative of a new law, but declaratory of the rights of all the people, as derived through the charter from their progenitors, time out of mind. It exhibited the most valuable part of their political constitution, and formed a sacred stipulation that it should never be violated. It would be a pleasing, and perhaps a useful employment, to trace and point out the numerous instances, wherein the general assembly have reasserted these solemn rights; but time will not admit of a minute detail. I cannot, however, be entirely silent upon this head.

At their September session, in the year one thousand seven hundred and sixty-five, "the general assembly, taking into the most serious consideration an act, passed by the British parliament at their last session, for levying stamp duties, and other internal duties, in North America, resolved, that the first adventurers, settlers of this his majesty's colony and dominion of Rhode Island and Providence Plantations, brought with them, and transmitted to their posterity, and all other his majesty's subjects, since inhabiting in this his majesty's colony, all the privileges and immunities that have at any time been held, enjoyed and possessed, by the people of Great Britain."

Afterwards, at the October session, in the year one

thousand seven hundred and sixty-nine, they unanimously passed the following resolution: "That all trials for treason, misprision of treason, or for any felony or crime whatsoever, committed and done in his majesty's said colony and dominion, by any person or persons residing therein, ought of right to be had and conducted in and before his majesty's courts held within the said colony, according to the fixed and known course of proceeding; and that the seizing of any person or persons, residing in this colony, suspected of any crime whatsoever, committed therein, and sending such person or persons to places beyond the sea to be tried, is highly derogatory to the rights of British subjects; as thereby the inestimable privilege of being tried by a jury from the vicinage, as well as the liberty of summoning and producing witnesses on such trial, will be taken away from the party accused."

The attempts of the British parliament to deprive us of this mode of trial, were among the principal causes that united the colonies in a defensive war, and finally effected the glorious revolution. This is evident from the declaration of rights made by the first congress, in October, in the year one thousand seven hundred and seventy-four; the preamble states, "that the inhabitants of the English colonies, in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters and compacts, have the following rights," the fifth of which is, "that the respective colonies are entitled to the common law of England, and more especially to the great and inestimable

privilege of being tried by their peers of the vicinage, according to the course of that law."

At the same time they enumerated the several acts of the British parliament to which they declared they could not submit, particularly "12 Geo. III. chap. 24, intituled, 'an act for the better securing his majesty's dock-yards, magazines, ships, ammunition and stores,' which declares a new offence in America, and deprives the American subject of a constitutional trial by jury of the vicinage, by authorizing the trial of any person, charged with the committing of any offence described in the act, out of the realm, to be indicted and tried for the same in any shire or county within the realm."

In pursuance of the same principle, upon the ever memorable fourth of July, in the year one thousand seven hundred and seventy-six, when the rights of the United States were exhibited in a new blaze of glory; when, to support them, the fathers of their country, "with a firm reliance on the protection of Divine Providence, mutually pledged to each other their lives, their fortunes, and their sacred honor;" when they submitted "to a candid world" the catalogue of their complaints against the king of Great Britain, they charged him with "depriving us, in many instances, of the benefits of trial by jury."

Here let us pause. If the first act of the English parliament now upon record, containing the great charter of the privileges of the subjects; if the exercise of those privileges for ages; if the settlement of a new world to preserve them; if the first solemn compact of the people of this state; if the sacred

declarations of the legislature at different periods, and upon the most important occasions; if the solemn appeal to heaven of the United States; in short, if the torrents of blood that have been shed in defence of our invaded rights, are proofs, then have we triumphed in the cause of humanity, then have we shown that the trial by jury is the birthright of the people.

Astonished am I, may it please the honorable court, that a doubt should have arisen in the mind of any, respecting the legal construction of our Magna Charta, our declaration of rights. Some of our warmest politicians, whose heads are undoubtedly wrong, and it is greatly to be feared their hearts are not right, have boldly asserted, that the clause which declares "that no freeman, &c. shall be tried, &c. but by the lawful judgment of his peers, or by the laws of the colony," &c. clearly authorizes any other mode of trial than that by jury, should the legislature frame a law for that purpose. That their act would become the law of the land, and so the special jurisdictions are perfectly conformable to the letter and spirit of our constitution.

Is it possible that these pretenders to the knowledge of law should be serious, when they avow so dangerous an opinion? If they are, let them be informed that they contradict the wisdom and the practice of ages. That whenever a statute makes mention of "the law of the land," it refers either to a particular preëxisting law, to the system of laws in general, or to the mode of legal process.

Lord Coke, in his readings upon the statute, has

fully demonstrated that the clause "or by the law of the land," regards the process only. That the particle *or* is to be construed conjunctively. And so the sentence will read, "by the lawful judgment of his peers, by, or according to, the law of the land," or, "and by the law of the land;" that is to say, by bill, plaint, information, or in any other legal manner.

There are many instances in the books of a similar construction. I shall produce only one, the case of Barker against Suretees.[1] "On a special verdict in ejectment, the question turned upon these words in a will, viz. I give the said premises to my grandson, his heirs and assigns; but in case he dies before he attains the age of twenty-one years, *or* marriage, *and* without issue, then, and in such case, he devised the same to the defendant. The fact was, the grandson attained twenty-one, and died, having never been married. And it was insisted, that the attaining twenty-one was a performance of the condition, and vested the estate absolutely in the grandson, under whom the lessor of the plaintiff claimed. And judgment was accordingly given in the county Palatine of Durham, whereof error was brought in banco regis. And, after several arguments, the court affirmed the judgment, upon the authority of Price against Hunt in Pollexf. 645, where the word *or* was construed conjunctively. And they said they would read this without the word *or*, as if it ran, 'and if he dies before twenty-one, unmarried and without issue;' which he did not do, for one of the

[1] Barker *v.* Suretees, (2 Strange, 1175.)

circumstances failed. And all put together are but in the nature of one contingency; and it was considered, that this was not a condition precedent, but to destroy an estate devised by the former words in fee."

I recollect in an excellent treatise of law in general, subjoined to the memoirs of the House of Brandenburg, written by that great legislator, the illustrious Frederick, when speaking of the laws of England, he quotes the heads of Magna Charta; and when speaking of this part in particular, his words are, "that nobody shall be imprisoned, or deprived either of life or estate, without being judged by his peers, and according to the laws of the kingdom."

The framers of this act, however, and the supporters of the present measure, are not without a precedent; and so cannot engross all the honor to themselves. And lest they should endeavor to palm themselves upon the deluded as originals, we will produce them an instance from the reign of Henry VII. as similar to the present, as the image in the mirror is to the substance.

That great oracle of the law, Lord Coke, records it in the following manner;[1] "Against this ancient and fundamental law, (trial by jury) and in the face thereof, I find an act of parliament made, that as well justices of assize, as justices of peace (without any finding or presentment of twelve men) upon a bare information for the king before them made, should have full power and authority, by their dis-

[1] Institutes, ii. 50, 51.

cretion, to hear and determine all offences and contempts, committed or done by any persons or persons, against the form, ordinance and effect, of any statute made and not repealed, &c. By color of which act, shaking this fundamental law, it is not credible what horrid oppression and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson and Edmund Dudley, being justices of peace through England. And upon this unjust and injurious act (as commonly in like cases it falleth out) a new office was erected, and they made masters of the king's forfeitures. But at the parliament holden in the first year of Henry VIII. this act of the eleventh of Henry VII. is recited and made void; for that by force of said act it was manifestly known, that many sinister and crafty, feigned and forged informations had been pursued against divers of the king's subjects, to their great damage and wrongful vexation. And the ill success hereof, and the fearful end of those two oppressors, should deter others from doing the like, and should admonish parliaments, that instead of this precious trial by jury, they bring not in absolute and partial trials by discretion."

Well may the countenances of certain gentlemen be changed. Well may their trembling limbs denote the perturbation of their minds. Well may "their hearts quake within them." For all others, who, like Empson and Dudley, violate the constitutional laws of their country, deserve, and, if they persist in their career, will probably meet their fate.

But we shall proceed, with the permission of your

honors, to inquire, whether the legislature can deprive the citizens of their constitutional right, the trial by jury.

When mankind entered into a state of civil society, they surrendered a part of their natural rights into the hands of the community, that they might enjoy the remainder with greater security. The aggregate of this surrender forms the power of government; the first and greatest exercise of which constitutes legislation, or the power of making laws. Consequently the legislature cannot intermeddle with the retained rights of the people.

In the infant state of society, when the community consisted of but few members, when their wants and desires were circumscribed within narrow bounds, the power of making laws was exercised by all the people assembled for that purpose, or at least by the heads of families, who derived from nature a temporary authority over their offspring. Whatever was necessary for the good or safety of the whole was agreed to, and each individual engaged to abide by the opinion of the majority. Such was the situation of our ancestors, when they first settled in this country.

As society increased in numbers and wealth, as their settlements were extended, and their views enlarged, it became necessary to delegate the powers of legislation, and vest them in one person, in a few, or in many, as the community deemed most conducive to their common advantage. Such was the situation of our ancestors, when they petitioned to King Charles II. to be incorporated into a company, with

the power of governing themselves. First, by the making of laws in a general assembly, to be convened twice in each year, composed of magistrates elected annually by the freemen at large, and of deputies chosen semi-annually from the respective towns as their representatives. And secondly, by carrying those laws into execution, by judiciary establishments.

The powers of legislation, in every possible instance, are derived from the people at large, are altogether fiduciary, and subordinate to the association by which they are formed. Were there no bounds to limit and circumscribe the legislature; were they to be actuated by their own will, independent of the fundamental rules of the community, the government would be a government of men, and not of laws. And whenever the legislators depart from their original engagements, and attempt to make laws derogatory to the general principles they were bound to support, they become tyrants. "For since it can never be supposed," as Mr. Locke well observes, "to be the will of the society, that the legislative should have a power to destroy that which every one designs to secure, by entering into society, and for which the people submitted themselves to legislators of their own making, whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people."[1] And again, "when the legis-

[1] Locke on Government, 392.

lators act contrary to the end for which they were constituted, those who are guilty, are guilty of rebellion."

The powers of our legislature are so clearly defined in the charter, which is conclusive evidence of the compact of the people, as well as of the royal intention, that a recurrence to them will greatly assist us in the present question. Let us attend, therefore, to the following passage: "And that they (the general assembly) or the greatest part of them then present, whereof the governor or deputy governor, and six of the assistants, at least to be seven, shall have, and have hereby, given and granted unto them, full power and authority, from time to time, and at all times hereafter, to make, ordain, constitute, or repeal such laws, statutes, orders and ordinances, forms and ceremonies of government and magistracy, as to them shall seem meet, for the good and welfare of the said company, and for the government and ordering the lands and hereditaments hereinafter mentioned to be granted, and of the people that do, or at any time hereafter shall, inhabit or be within the same; so as such laws, ordinances and constitutions, so made, be not contrary and repugnant unto, but, as near as may be, agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there."

This grant, which was obtained in consequence of an association of all the people for that purpose, expressly limits the legislative powers; and by invariable custom and usage they are still so confined, that they cannot make any laws repugnant to the general

system of laws which governed the realm of England at the time of the grant. The revolution has made no change in this respect, so as to abridge the people of the means of securing their lives, liberty and property; to preserve which they have ever considered the trial by jury the most effectual.

There are certain general principles that are equally binding in all governments, more especially those which define the nature and extent of legislation. I do not recollect of having ever observed them so clearly and elegantly described, as in a treatise written by M. de Vattel, upon the laws of nations and of nature. I shall introduce him, therefore, as he is translated, in his own words.

"In the act of association, in virtue of which a multitude of men form together a state or nation, each individual has entered into engagements with all, to procure the common welfare; and all have entered into engagements with each individual to facilitate for him the means of supplying his necessities, and to protect and defend him. It is manifest that these reciprocal engagements can no otherwise be fulfilled, than by maintaining the political association. The entire nation is then obliged to maintain that association; and as in its duration the preservation of the nation consists, it follows from thence that every nation is obliged to perform the duty of self-preservation."

"The constitution and its laws are the basis of the public tranquillity, the firmest support of the public authority, and pledge of the liberty of the citizens. But this constitution is a vain phantom, and the best

laws are useless, if they are not religiously observed. The nation ought then to watch very attentively, in order to render them equally respected by those who govern, and by the people destined to obey. To attack the constitution of the state, and to violate its laws, is a capital crime against society; and if those guilty of it are invested with authority, they add to this crime a perfidious abuse of the power with which they are intrusted. The nation ought constantly to suppress these abuses with its utmost vigor and vigilance, as the importance of the case requires. It is very uncommon to see the laws and constitution of a state openly and boldly opposed; it is against silent and slow attacks that a nation ought to be particularly on its guard."

But here, the attack is open and bold; it comes with violence; it moves with huge gigantic strides, and threatens slavery or death.

"A very important question here presents itself. It essentially belongs to the society to make laws, both in relation to the manner in which it desires to be governed, and to the conduct of the citizens. This is called the legislative power. The nation may entrust the exercise of it to the prince, or to an assembly; or to that assembly and the prince jointly; who have then a right of making new, and abrogating old laws. It is here demanded, whether, if their power extends so far as to the fundamental laws, they may change the constitution of the state? The principles we have laid down lead us to decide this point with certainty, that the authority of these legislators does not extend so far; and that they ought to con-

sider the fundamental laws as sacred, if the nation has not, in very express terms, given them the power to change them. For the constitution of the state ought to be fixed; and since that was first established by the nation, which afterwards trusted certain persons with the legislative power, the fundamental laws are excepted from their commission. It appears that the society had only resolved to make provision for the state's being always furnished with laws suited to particular conjunctures; and gave the legislature, for that purpose, the power of abrogating the ancient civil and political laws that were not fundamental, and of making new ones; but nothing leads us to think, that it was willing to submit the constitution itself to their pleasure. In short, these legislators derive their power from the constitution; how then can they change it, without destroying the foundation of their authority?" [1]

Have the citizens of this state ever entrusted their legislators with the power of altering their constitution? If they have, when and where was the solemn meeting of all the people for that purpose? By what public instrument have they declared it, or in what part of their conduct have they betrayed such extravagance and folly? For what have they contended through a long, painful and bloody war, but to secure inviolate, and transmit unsullied to posterity, the inestimable privileges they received from their forefathers? Will they suffer the glorious price of all their toils to be wrested from them, and lost

[1] Vattel, Law of Nations, 12, 17, 18.

forever, by men of their own creating? They who have snatched their liberty from the jaws of the British lion, amidst the thunders of contending nations, will they basely surrender it to the administration of a year? As soon may the great Michael kick the beam, and Lucifer riot in the spoils of angels!

Constitution! we have none; who dares to say that? None but a British emissary, or a traitor to his country. Are there any such amongst us? The language has been heard, and God forbid that they should continue! If we have not a constitution, by what authority do our general assembly convene to make laws, and levy taxes? Their appointment by the freemen of the towns, excluding the idea of a preëxisting social compact, cannot separately give them power to make laws compulsory upon the other towns. They could only meet, in that case, to form a social compact between the people of the towns. But they do meet by the appointment of their respective towns, at such times and places, and in such numbers, as they have been accustomed to do from the beginning. When met, they make laws and levy taxes, and their constituents obey those laws, and pay their taxes. Consequently they meet, deliberate and enact, in virtue of a constitution, which, if they attempt to destroy, or in any manner infringe, they violate the trust reposed in them, and so their acts are not to be considered as laws, or binding upon the people.

But as the legislative is the supreme power in government, who is to judge whether they have violated the constitutional rights of the people? I an-

swer, their supremacy (consisting in the power of making laws, agreeably to their appointment) is derived from the constitution, is subordinate to it, and therefore, whenever they attempt to enslave the people, and carry their attempts into execution, the people themselves will judge, as the only resort in the last stages of oppression. But when they proceed no farther than merely to enact what they may call laws, and refer those to the judiciary courts for determination, then, (in discharge of the great trust reposed in them, and to prevent the horrors of a civil war, as in the present case,) the judges can, and we trust your honors will, decide upon them.

In despotic countries, where the sovereign mandate issues from the throne, surrounded by servile flatterers, sycophants and knaves, the judge has nothing more to do than execute. His office is altogether ministerial, being the passive tool of that lawless domination by which he was appointed. Properly speaking, the judiciary power cannot exist where political freedom is banished from the administration. For without a system of laws, defining and protecting the rights of the people, there can be no fixed principles or rules of decision. Hence it is, that wherever the distinct powers of government are united in one head, whether that head consists of one, or of many, the subjects groan under perpetual servitude.

I say of one or of many: for it is very immaterial by whom scourges, chains and tortures, are inflicted, provided we must submit to them. The studied and unheard of cruelties of a Dionysius, who violated every right of humanity in his tyranny over the Syra-

cusians during the space of thirty-eight years, were not more horrid and execrable than the united barbarities of the Council of Thirty, established at Athens, who caused more citizens to be murdered in eight months of peace, than their enemies had destroyed in a thirty years war!

Nor am I capable of distinguishing between an established tyranny, and that government where the legislature makes the law, and dictates to the judges their adjudication. For in that case, were they to enact tyrannical laws, they would be sure to have them executed in a tyrannical manner. The servility of the courts would render them totally subservient to the will of their masters, and the people must be enslaved, or fly to arms.

In civil as well as moral agency, there is a freedom of the will necessarily exerted in forming the judgment. Without the exercise of this, we cannot be said to determine at all, but our actions are wholly passive; and so, in a moral sense, we could not be accountable, and in a civil point of view we should be deprived of all liberty. Every being naturally endeavors its own preservation; and the more conformably its actions are to its nature, the nearer it approaches to perfection: but when its actions are impelled by external force, it is deprived of the means both of preservation and of perfection.

A nation may be considered as a moral being, whose health and strength consist in the due proportion, nice adjustment and equal preservation, of all its parts; and when one branch of the government steps into the place of another, and usurps its func-

tions, the health and the strength of the nation are impaired: and should the evil be continued, so as that the one be destroyed by the other, the nation itself would be in danger of dissolution.

Have the judges a power to repeal, to amend, to alter laws, or to make new laws? God forbid! In that case they would become legislators. Have the legislators power to direct the judges how they shall determine upon the laws already made? God forbid! In that case they would become judges. The true distinction lies in this, that the legislature have the incontrollable power of making laws not repugnant to the constitution: the judiciary have the sole power of judging of those laws, and are bound to execute them; but cannot admit any act of the legislature as law, which is against the constitution.

The judges are sworn "truly and impartially to execute the laws that now are or shall hereafter be made, according to the best of their skill and understanding." They are also sworn "to bear true allegiance and fidelity to this state of Rhode Island and Providence Plantations, as a free, sovereign and independent state." But this became a state in order to support its fundamental, constitutional laws, against the encroachments of Great Britain. The trial by jury, as has been fully shown, is a fundamental, a constitutional law; and therefore is binding upon the judges by a double tie, the oath of allegiance, and the oath of office. It is a rule in ethics, "that if two duties or obligations, both of which cannot be per formed, urge us at the same time, we must omit the lesser, and embrace the greater."

Let the question then fairly be stated. The general assembly have made a law, and directed the judges to execute it by a mode of trial repugnant to the constitution. What are the judges to resolve? Did the nature of their jurisdiction admit of such a mode of trial at the times of their appointment and taking the oath of office? Surely it did not. The act of assembly then erects a new office, the exercise of which, other things equal, they may undertake, or refuse, at their own option. There is no duty, no obligation in the way. In refusing, they incur no penalty; nor can their so doing work a forfeiture of their offices as judges of the supreme judiciary court. But when it is considered that the exercise of this office would be acting contrary to their oath of allegiance, and the oath of office, they are bound to reject it, unless the general assembly have power to absolve them from these oaths, and compel them to accept of any appointment they may be pleased to make.

I have heard some gentlemen speak of the laws of the general assembly. I know of no such laws, distinct from the laws of the state. The idea is dangerous; it borders upon treason! "'tis rank — it smells to heaven!"

Laws are *made* by the general assembly under the powers they derive from the constitution, but when made they become the laws of the land, and as such the court is sworn to execute them. But if the general assembly attempt to make laws contrary hereunto, the court cannot receive them as laws; they cannot submit to them. If they should, let me

speak it with reverence, they would incur the guilt of a double perjury.

The life, liberty and property of the citizens are secured by the general law of the state. We will then suppose (as the very nature of the argument allows us to view the argument in every possible light) that the general assembly should pass an act, directing that no citizen should leave his house, nor suffer any of his family to move out of the same, for the space of six months, upon the pain of death. This would be contrary to the laws of nature. Suppose they should enact that every parent should destroy his first born child. This would be contrary to the laws of God. But, upon the common principles, the court would be as much bound to execute these acts as any others. For if they can determine upon any act, that it is not law, and so reject it, they must necessarily have the power of determining *what* acts are laws, and so on the contrary. There is no middle line. The legislature has power to go all lengths, or not to overleap the bounds of its appointment at all. So it is with the judiciary; it must reject all acts of the legislature that are contrary to the trust reposed in them by the people, or it must adopt all.

But the judges, and all others, are bound by the laws of nature in preference to any human laws, because they were ordained by God himself anterior to any civil or political institutions. They are bound, in like manner, by the principles of the constitution in preference to any acts of the general assembly, because they were ordained by the people

anterior to, and created the powers of, the general assembly.

This mode of reasoning will equally apply in law as in philosophy. For wherever there is a given force applied to put a body in motion, that motion will continue until the body is opposed by an equal or greater force. And the judges being sworn to execute the fundamental laws, they must continue to execute them until they shall be controlled by laws of a superior nature. But that can never happen, until all the people assemble for the purpose of making a new constitution. And indeed I very much doubt if the citizens of any one state have power to adopt such a kind of government, as to exclude the trial by jury, consistently with the principles of the confederation.

It having been shown that this court possesses all the powers in this state, that the courts of king's bench, common pleas, and exchequer, possess in England, let us turn to the authorities, and observe the adjudications of those courts in similar cases. Blackstone informs us, that "acts of parliament that are impossible to be performed; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void." The same author having previously observed, that "the judges are the depository of the laws; the iving oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land." In Bacon's Abridgment we

read, "if a statute be against common right or reason, or repugnant, or impossible to be performed, the common law shall control it, and adjudge it to be void." Here permit me, may it please your honors, to apply the authority to the act, and see how exactly it corresponds.

Is it consistent with common right or reason, that any man shall be compelled to receive paper, when he has contracted to receive silver? That for bread he shall receive a stone, or for fish a serpent? Is it consistent with common right or reason, that he shall receive the paper, dollar for dollar with silver, when it is fully known that the discount in general is from three to four for one, among those who receive the paper at all, and that there are very many who totally refuse it? That he should be called from his business, and subjected to a fine for his refusal, when there is not a man in the state, but upon principles of justice to himself and family would have done the same? Is it right or reasonable, that for such refusal he should be called to trial in a summary manner, in three days, and that no essoin, protection, privilege or injunction, shall be in anywise prayed, granted or allowed? Suppose him to be confined to his bed by sickness, is he to be passed upon *ex parte?* No man is to be injured by the act of God, or by the act of the law. Suppose his witnesses are sick or absent, and cannot be procured by the time, he is not allowed even to pray for an indulgence; or if he should pray ever so fervently, he cannot be heard. Suppose him to be summoned to attend at two, or at

all the counties at the same time, upon different informations, he is still to be condemned unheard. Even suppose him to stand in need of professional assistance, but that he cannot obtain at the moment, the gentlemen of the law being all necessarily attending upon a special session of the general assembly, is he to be deprived of counsel?

"Repugnant, or impossible to be performed." Is not the act repugnant, when it authorizes the judges to "proceed to trial without any jury, according to the laws of the land?" The laws of the land constitute the jurors the triers of facts, and the judges the triers of law only, according to the known maxim, "ad questionem juris respondent judices, ad questionem facti respondent juratores." How is it possible, then, that the judges should try, without jury, — and they are directed as well as authorized so to do, — "the said court shall proceed," — and at the same time according to the laws of the land, when those laws direct "that no man, of what estate and condition soever, shall be molested, without being, for it, brought to answer by due course of law, nor passed upon nor condemned, but by the lawful judgment of his peers?" Can contraries exist, and be executed at the same time? This act, therefore, is impossible to be executed.

Here is a new office indeed; and were your honors to suffer the special jurisdictions to attempt to carry the act into effect, what inconceivable mischiefs would ensue? Is there a member of the administration, or any other, that will sell his beef, his pork, his corn, or his cheese, so as to enable the re-

tailers and huxters to sell those articles again for paper, at the same rate they could be afforded for silver or gold? There is not. What is the consequence? Every evil-minded person in the state is invited by law to turn informer (a most despicable office) and more than five hundred prosecutions would take place in the course of a week! Horrible reflection. The idle, the profligate, the abandoned of every character, would appear in the group of prosecutors or witnesses, urged and pushed on by petty conventions and designing juntos, till perjury would run down our streets like a stream, and violence like a mighty river. The judges themselves might be tempted, by the perquisites of office, to encourage informations, until every man of industry, of business, and of property, must quit the state, retire from business, give up his property, or join in an opposition of force. The temptation is great, and seriously alarming. For to secure the judges individually, and their personal influence, the very emit ting act directs that they shall receive all moneys tendered and refused for past contracts, and at the expiration of three months deposit them in the general treasury. What room for peculation, what inducement to corruption, what incentives to depreciate the currency!

Oh! it is an abominable act! Yet some there are, and, to our shame be it spoken, too many, who tend it, who nurse it, who hug it to their bosom as a darling child. But let me tell them it is a furious offspring, conceived by an unlawful convention, and brought forth by —— at an unguarded hour. 'Tis

a monster, and, as the immortal Pope expresses it upon another occasion,

> It is a monster of so frightful mien,
> As to be hated, needs but to be seen;
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace!

Let us see it therefore but once! Let us consign it, O ye judges, to its fate! Death is in its constitution, and die it must!

But to return, for I must confess the digression is not particularly directed to the point more immediately in question: we again read in Bacon's Abridgment,[1] that "the power of construing a statute is in the judges; for they have authority over all laws, more especially over statutes, to mould them according to reason and convenience to the best and truest use." Here the author refers to Hobart, Plowden, and Lord Coke, who fully justify the doctrine he advances. They are upon the table, and will be produced, if your honors require it; but we presume it would be only trespassing upon your patience, too much exhausted already, by a tedious discussion.

The satisfaction you are pleased to express upon this head, enables us to pursue the subject in another point of view. Perhaps there is not a civilized country on earth, where so small a portion of natural liberty is given into the stock of political society, as by the people of this state. There is a certain period in every year when the powers of government seem to expire; for the authority of the old officers ceases

[1] Vol. 4, 643.

with the appointment of the new, and these cannot act until they are commissioned and sworn. The legislative of one house being composed of new members, or members newly elected twice in the year, feels and carries into effect the sentiments of the people, founded upon the extremes of liberty. The electors in the respective towns have generally some point to obtain; or, which is more unfriendly to public liberty, they are divided by parties, and so the members elected become the advocates of local, interested measures, without comparing them with the more extensive objects of the community. The sessions seldom exceed the limits of a week: new laws are proposed, acted upon and adopted, according to the first or the preconcerted impressions of passion, without time for deliberation or reflection. The upper house, it is true, hath a negative upon the house of deputies; but they never persist in exercising it without endangering their next election. The appointment of the judges, justices of the peace, and other officers of government, being made by the members of both houses in a grand committee, is very often the result of political arrangements; and more attention is paid to the carrying of certain points, than to the qualification of the candidates; so that the people feel no great restraint from this quarter.

What is there then, in the nature of our government, to prevent anarchy and confusion on the one hand, or tyranny and oppression on the other? Before the revolution, the king, as supreme executive, formed the balance; but since, the executive power

hath become blended with the legislative, and we have not, like the other states in the union, adopted any substitute for this defect.

The moment, therefore, that this court feels itself dependent upon the legislature, in the exercise of its judiciary powers, there will be an end of political liberty: for there is not an individual of mankind but wishes, if possible, to be exempt from the compacts that bind others. And there may be conjunctures in which the love of natural liberty will bid defiance to the restraints of law, if the legislature are blindly guided by the general impulse. Or should these attachments be more strongly fixed to the interests of a few designing men than to the public wish, tyranny would spring out of anarchy. In either case, the interposition of the judiciary may save the constitution, at least for a time; and, by averting the immediate evil, will give scope for reflection, and so prevent a dissolution of government.

It is extremely to be regretted, that this court is not as independent in the tenure by which the judges hold their commissions, as they are in the exercise of their judicial proceedings. The frequent changes that arise from annual appointments may have an influence upon legal decisions, and so destroy that uniformity which is essentially requisite to the security of individuals. But from these considerations we have nothing to fear upon the present occasion: for the knowledge, the integrity, the firmness of the bench, will rise superior to every obstacle; and the dignity of their determinations will display a lustre awful even to tyranny itself.

To this honorable court the warmest thanks of the defendant, of this assembly, of every citizen, are due, for their solicitous attention to their unalienable rights. Their expectations, their joyous hopes, await your determination; and we all pray to heaven, that before to-morrow's sun shall deck the western sky, our hopes may wanton in complete enjoyment!

Then ev'ry gen'rous breast shall glow with purest flame
Of gratitude; and fathers, anxious for the public good,
Relate the glorious deed to their attentive sons,
Who 'll venerate the names of those immortal five,
Who nobly dar'd to save our dying laws!

I cannot further pursue the subject, but must come to a conclusion. We have attempted to show, that the act, upon which the information is founded, has expired: that by the act special jurisdictions are erected, incontrollable by the supreme judiciary court of the state: and that, by the act, this court is not authorized or empowered to empanel a jury to try the facts connected in the information: that the trial by jury is a fundamental, a constitutional right — ever claimed as such — ever ratified as such — ever held most dear and sacred; — That the legislature derives all its authority from the constitution — has no power of making laws but in subordination to it — cannot infringe or violate it; That therefore the act is unconstitutional and void; That this court has power to judge and determine what acts of the general assembly are agreeable to the constitution; and, on the contrary, that this court is under the most solemn obligations to execute the laws of the

land, and therefore cannot, will not, consider this act as a law of the land.

Oh! ye judges, what a godlike pleasure must you now feel in having the power, the legal power, of stopping the torrent of lawless sway, and securing to the people their inestimable rights! Rest, ye venerable shades of our pious ancestors! our inheritance is yet secure! Be at peace, ye blessed spirits of our valiant countrymen, whose blood has just streamed at our sides, to save a sinking land!

When the tear is scarcely wiped from the virgin's eye, lamenting an affectionate father, a beloved brother, or a more tender friend; while the matron still mourns, and the widow bewails her only hope; while the fathers of their country, superior to the ills of slaughter, are completing the mighty fabric of our freedom and independence, shall the decision of a moment rob us of our birthright, and blast forever our noblest prospects? Forbid it, thou Great Legislator of the Universe! No:

> The stars shall fade away, the sun himself
> Grow dim with age, and nature sink in years;
> But thou [fair liberty] shalt flourish in immortal youth,
> Unhurt amidst the war of elements,
> The wreck of matter, and the crush of worlds!

Such was the address of Mr. Varnum. Whatever may be thought of it in point of style, it contained sound doctrine, enforced in a clear and able manner, and it exerted a powerful influence in favor of just principles. The court decided, that the "information was not

cognizable before them."[1] Their decision was received with equal surprise by the two political parties. While the friends of a sound currency were amazed at the independence of a tribunal, annually elected, one member at least of which was of the paper-money party, they hailed it as a sure sign of returning reason, and the harbinger of better things. But by the legislature itself the result was received with the deepest mortification and chagrin. The general assembly was specially convened by the governor, and on the first day of the session a summons was issued from both houses, requiring an immediate attendance of the judges, to assign their reasons for adjudging an act of the "supreme legislature of the state unconstitutional, and so absolutely void." Two of the judges accordingly attended, but the other two being ill, the assembly postponed the matter two weeks. At that time the chief justice was still too ill to attend, but the other judges appeared and gave notice to both houses "that they awaited their pleasure." They were informed that the assembly was ready to hear them, and would proceed immediately upon the business for which they were in attendance. Certain ceremonies having been adjusted, and the

[1] Mr. Updike, in his Memoirs of the Rhode Island Bar, states the judgment of the court to have been "that the amended acts of the legislature *were unconstitutional and void.*" And the general assembly, on their records, refer to the court as having "declared and adjudged an act of the supreme legislature of this state to *be unconstitutional, and so absolutely void.*" But the judgment of the court appears to have been simply, "that the information was not cognizable before them." See Varnum's Report, page 1; and also the distinction taken by Mr. Justice Howell in his address to the general assembly, on the next page.

records of the court produced, David Howell, the youngest judge, addressed the general assembly in a learned and elaborate speech of six hours. He remarked, in the first place, that the order by which the judges were before the house might be considered as calling upon them to assist in matters of legislation, or to render the reasons of their judicial determination, as being accountable to the legislature for their judgment. In the former point of view, the court were ever ready, as constituting the legal counsellors of the state, to render every kind of assistance to the legislature, in framing new, or repealing former laws; but for the reasons of their judgment upon any question judicially before them, they were accountable only to God, and their own consciences. He then pointed out the objectionable parts of the act upon which the information was founded, and argued that it was unconstitutional, had not the force of a law, and could not be executed.

But he denied, that the judges were accountable to that tribunal, for the reasons of their judgment. In the first place, the legislature had assumed a fact, in their summons to the judges, which was not justified or warranted by the records. The plea of the defendant, in a matter of mere surplusage, mentions the act of the general assembly as "unconstitutional, and so void;" but the judgment of the court simply is, "that the information is not cognizable before them." Hence it appears that the plea has been mistaken for the judgment.

Whatever might have been the opinion of the

judges, they spoke by their records, which admitted of no addition or diminution. They might have been influenced respectively by different reasons, as the whole act was judicially before them, of which, it being general, they could judge by inspection, without confining themselves to the particular points stated in the plea. It would be out of the power, therefore, of the general assembly to determine upon the propriety of the court's judgment, without a particular explanation. If this could be required in one instance, it might in all; and so the legislature would become the supreme judiciary. A perversion of power totally subversive of civil liberty.

If it be conceded, that the equal distribution of justice is as requisite to answer the purposes of government as the enacting of salutary laws, it is evident that the judiciary power should be as independent as the legislative. And consequently the judges cannot be answerable for their opinion, unless charged with criminality. The nature of their office obliges them to decide upon every question that can arise in legal process. If they are not directed by their own understanding, uninfluenced by the opinion of others, how can they be said to judge at all? The very act of judging, supposes an assent of the mind to the truth or falsehood of a proposition. And if a decision is given contrary to this assent, the judge is guilty of perjury, and ought to be rendered infamous.

Every man is excusable for errors of the head, provided sufficient attention has been paid to the means of information; but no man is excusable for

depravity or corruption of the heart. The judges may err; for error is the lot of humanity. Perfection cannot be required of imperfect beings. But the very idea of being accountable to the legislature, in matters of opinion, supposes the legislature to possess the standard of perfection. A thought highly derogatory to the attributes of Deity!

Baron Montesquieu, in his Spirit of Laws, observes; "There is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

Blackstone in his Commentaries adopted the same ideas. Serjeant Hawkins is precise and conclusive, "that no such judge is in any way punishable for a mere error of judgment. And as the law has exempted jurors from the danger of incurring any punishment, in respect of their verdict in criminal causes, it has also freed the judges of all courts of record from all prosecutions whatsoever, except in the parliament, for anything done by them openly in such courts as judges; for the authority of a government cannot be maintained, unless the greatest credit be

given to those, who are so highly entrusted with the administration of public justice; and it would be impossible for them to keep up in the people that veneration of their persons, and submission to their judgments, without which it is impossible to execute the laws with vigor and success, if they should be continually exposed to the prosecutions of those, whose partiality to their own causes would induce them to think themselves injured. Yet if a judge will so far forget the dignity and honor of his post, as to turn solicitor in a cause which he is to judge, and privately and extrajudicially tamper with witnesses, or labor jurors, he has no reason to complain, if he be dealt with according to the same capacity to which he so basely degrades himself."

Comparing these passages together, the intention of the author is apparent, that, in the first place, the judges are not answerable at all for mere error of judgment; and in the second, they are triable only in parliament for matters of a criminal nature. The same point is fully asserted in Bacon: "But though they are to judge according to the settled and established rules and ancient customs of the nation, approved for many successions of ages, yet are they freed from all prosecutions for anything done by them in court, which appears to have been an error of their judgment."

So tender and delicate is the law in this respect, that even justices of the peace are sacredly guarded from every kind of prosecution upon account of their opinion. Upon the 10th of May, 1757, a motion

was made in the king's bench[1] for an information against two justices of the peace, for arbitrarily, obstinately and unreasonably refusing to grant a license to one Henry Day, to keep an inn at Eversley; where it was alleged and sworn to be fit and proper, and even necessary, that there should be an additional one (there being one there already) and for which occupation of keeping an inn this man was (as those two justices themselves had allowed on a former occasion) a proper person, they having before licensed him to do so at another place.

Lord Mansfield, and Mr. Justice Denison, held, that notwithstanding this was a matter left in a great measure to the discretion of the justices, yet if it appeared to the court, from sufficient circumstances laid before them, that their conduct was influenced by partial, corrupt or arbitrary views, instead of exercising a fair and candid discretion, the court might call upon them to show the reasons whereby they guided their discretion.

"The justices thus entrusted have a right to judge for themselves; no man can judge for another. And this power is entrusted to them by the constitution, by the legislature. It may be very dangerous to them to be obliged to give their reasons publicly; though they may have very sufficient ones to satisfy their own minds, and to direct their own judgments. And if they are thus entrusted, why are they liable to be called to an account by any other jurisdiction, unless they act faultily and wilfully wrong? Indeed,

[1] *Rex* v. *Young and Pitts*, (Burroughs, 556.)

if they do wilfully wrong, let them be punished; but where they act quite conscientiously, they are not accountable to anybody."[1]

"But if it clearly appear that the justices have been partially, maliciously or corruptly influenced in the exercise of this discretion, and have (consequently) abused the trust reposed in them, they are liable to prosecution by indictment or information, or even, possibly, by action, if the malice be very gross and injurious."

"If their judgment is wrong, yet their heart and intention pure, God forbid that they should be punished! And he declared that he should always lean towards favoring them, unless partiality, corruption, or malice, should clearly appear."

Mr. Howell having concluded his address, Mr. Tillinghast said, that nothing could have induced the gentlemen of the court to accept the office to which they were appointed, but a regard to the public good; that their perquisites were trifling, and their salaries not worth mentioning. The only recompense they expected, or could receive, was a consciousness of rectitude, which had supported them, and he was confident would support them, through every change of circumstances; melancholy indeed would be the condition of the citizens, if the supreme judiciary of the state was liable to reprehension, whenever the caprice or the resentment of a few leading men

[1] This paragraph is quoted by Mr. Howell as the language of the court, but it is taken from the argument of Sir Richard Lloyd.

should direct a public inquiry. As one member of the court, he felt himself perfectly independent, while moving in the circle of his duty; and however he might be affected for the honor of the state, he was wholly indifferent about any consequences that might possibly respect himself. The opinion he had given resulted from mature reflection, and the clearest conviction; his conscience testified to the purity of his intentions, and he was happy in the persuasion, that his conduct met the approbation of his God.

Mr. Hazard then spoke as follows: My brethren have so fully declared my sentiments upon this occasion, that I have nothing to add by way of argument. It gives me pain that the conduct of the court seems to have met the displeasure of the administration. But their obligations were of too sacred a nature for them to aim at pleasing, but in the line of their duty. It is well known, that my sentiments have fully accorded with the general system of the legislature in emitting the paper currency; but I never did, I never will, depart from the character of an honest man, to support any measures, however agreeable in themselves. If there could have been a prepossession in my mind, it must have been in favor of the act of the general assembly; but it was not possible to resist the force of conviction. The opinion I gave upon the trial was dictated by the energy of truth: I thought it right — I still think so. Be it as it may, we derived our understanding from the Almighty, and to him only are we accountable for our judgment.

The judges having thus defended themselves, an animated debate took place among the members of the assembly, and the question being stated, "whether the assembly was satisfied with the reasons given by the judges in support of their judgment?" it was decided in the negative. A motion was then made to dismiss the judges from their office; but before the question was taken on this motion, the following memorial, signed by the three judges — Hazard, Tillinghast and Howell — was sent in:

To his excellency the governor, and his honor the speaker of the lower house of assembly: To be communicated to both houses.

"The underwritten, appointed justices of the superior court, &c., at the annual election in May last, for the term of the current year, and cited to appear before the general assembly at their present session, by an order therefor, passed at their last session, specially convened in the city of Newport, "to render the reasons of a certain judgment given by said court, at the last term thereof in the county of Newport," having appeared before both houses in a grand committee, and made full communication of all the proceedings of the court, relative to the case in which said judgment was rendered; and having entered into a full and free examination of the several parts and principles of the penal law in question, and compared them with the constitution, or fundamental laws of the state, and all other laws operating thereon, which secure to the citizens thereof their rights and privileges; and having established their observations thereon by many the most approved authori-

ties in law, as well as by the constitution and doings of the federal union, and the members thereof, since the revolution in this country; for the advice and assistance of the general assembly in point of legislation — concluded, by utterly denying the power of the legislature to call upon them for the particular reasons of their judgment in that, or any other case; and declining to render the same — alleging and maintaining, by arguments and authorities of law, that for the same they are "accountable only to God (under the solemnities of their oath of office) and to their own consciences." And while, to remove misapprehensions, they disclaim and totally disavow any the least power or authority, or the appearance thereof, to contravene or control the constitutional laws of the state, or acts of the general assembly — they conceive that the entire power of construing and judging of the same, in the last resort, is vested solely in the supreme judiciary of the state. And whereas, in the citation aforesaid, no charge is contained against the underwritten, in their aforesaid capacity, nor had they reason to apprehend any proceedings were to be grounded thereon, to affect their lives, liberties or property, or their estate in their office aforesaid, or their good name and character, as officers of this state: — And whereas, from appearances, there is reason to apprehend that a design is formed, and ripening for execution, by a summary vote of the legislature, either to dismiss them from their aforesaid office, or to suspend them from the power of exercising the same:

"Wherefore, they pray that they may have a hear-

ing by counsel before some proper and legal tribunal, and an opportunity to answer to certain and specific charges, if any such can be brought against them, before any sentence or judgment be passed, injurious to any of their aforesaid rights and privileges. And this they claim and demand as freemen, and officers of this state; and, at the same time, with deference, utterly protest against the exercise of any power in the legislature, by a summary vote, to deprive them of their right to exercise the functions of their aforesaid office, without the aforesaid due process of law, or a commencement thereof (in which latter case a suspension only from the duties of office can take place) before the full term for which they were appointed and engaged, under the constitution of the state, shall be completed: and more especially, upon a mere suggestion of a mere error of judgment."

This memorial having been received, the judges informed the assembly, that they wished to be heard by counsel. James Mitchell Varnum, who had so ably argued the case upon which the court had pronounced the judgment complained of, now addressed the house in defence of the court.

In commencing his address, Mr. Varnum said, that the necessity of exhibiting the memorial upon the table, arose from the motion last made by one of their honorable members, for dismissing the judges from office, without any previous charge of criminality. A measure so novel as this motion tended to produce, could not have been foreseen or expected; and, therefore, it would not be thought strange if the counsel was not fully prepared to meet and oppose it.

What do the judges pray for? That if they are to be passed upon for anything respecting their duty, they may first know for what offence they are to be judged; that the particular charge or charges may be specified; that they may have time for defence; that they may be heard before a tribunal legally constituted; and that they be heard by counsel.

Is there a gentleman in this assembly so inattentive to the rights of his constituents, as to refuse, upon this occasion, what the lowest peasant, nay the vilest criminal, is entitled to receive? I presume there is not. And notwithstanding many of them may suppose that the honor of the legislature is wounded by the decision of the court, and so would wish to restore it, even by sacrificing the judges; yet I am confident they will not incur the imputation of real disgrace, by removing the barriers to personal security, and the preservation of property. For if they would preserve in the minds of the citizens an attachment to their measures, and a veneration for their laws, they certainly will not openly violate the laws themselves.

Be pleased to recollect a paragraph in our declaration of rights, our Magna Charta, wherein it is provided, "that no man, of what estate and condition soever, shall be put out of his lands and tenements, nor taken, nor imprisoned, nor disinherited, nor banished, nor any ways destroyed, nor molested, without being for it brought to answer by due course of law." If it were in the power of the general assembly to nullify this part of our constitution (which we utterly deny) they have not done it. The right is still

guarded by all the solemnities of law, and therefore the honorable remonstrants claim and demand its benefits. This they do, from your honors, not as a legislative, but as acting in a judicial capacity; for the passing of sentence is the exercising a judiciary power, grounded upon a preëxisting law. You are bound then by that oath, to which you all submitted as a necessary qualification, previously to your becoming members; and which is in these words: "And you do farther engage equal right and justice to do to all persons that shall appeal unto you for your judgment in their respective cases."

It is perfectly immaterial upon the present argument, whether the judgment of the court was right or wrong; whether it was agreeably to law, or against law. The only question is, whether they can, in any respect, be brought to answer for it, but by due course of law? And consequently, whether they can be passed upon and condemned, until they be proved guilty of a crime?

The tenure by which all commissions are held in this state, is for the space of one year. Consequently, during that term, every officer has an interest, a kind of estate, inseparably annexed to his appointment, to be divested of which, he must either neglect, misuse, or abuse his trust, so as to work a forfeiture. This neglect, misuse, and abuse, include questions of fact, which must appear, either by the confession of the party, or by proof, before the forfeiture can be declared. But how can the facts appear to be true or false, without an impartial and candid examination? And how can such ex-

amination take place until the facts or charges are particularly stated, and the party accused have an opportunity of making defence, in such way as he shall deem most beneficial to himself? Suppose he should deny the facts, he must certainly be presumed innocent till the contrary appear. How shall the contrary appear, but by producing evidence, oral or written? If oral, has he not a right to cross-examine the witnesses, to disqualify them, or produce others to disprove their testimony, either by destroying their credibility, or proving some other proposition totally inconsistent with that asserted by them? Or, if the evidence be written, has he not a right to suggest and establish alteration, diminution, or even forgery itself? In short, can there exist, in contemplation of law, the possibility of an accusation, that cannot be controverted, and proved to be groundless?

If the judges held their commissions during the pleasure of the general assembly, then indeed they might be removed without the formalities of a trial. But, even in that case, the exercise of so high a prerogative, without some kind of suggestion and proof, would be deemed injurious and oppressive. In the present case, however, wherein the judges cannot be molested, but by being called to answer for some crime, by due course of law, there is not even a suggestion, that they have intentionally departed from the line of their duty. Then are they secured in their posts, during the term of their appointment, in as sacred a manner as the property of any individual is guarded against the encroachments of a rapacious neighbor. They stand upon the firm ground of recti-

tude and independence. If any man has any accusation to exhibit, let him come forth; — let him produce the list of his charges; — they are willing to meet him. But they will meet him only upon due and legal process, and before a court lawfully qualified to try them. Should no such accusation be made, what remains but that the judges be immediately discharged from any further attendance upon this assembly?

Should they be impeached, I pledge myself to show, that they cannot be tried by this honorable assembly. But if a contrary sentiment should prevail, I must request time, till the next session, to be prepared with arguments and authorities, to establish a doctrine so important in its consequences. Permit me, however, for the present, to observe, that in England the judges are appointed by the king, as the supreme executive. Their commissions are during good behavior; and therefore they are not triable by the king, but by the parliament only, and upon impeachment. Were they to be tried by the king, who appoints them, their judgments might be influenced by his authority; and so the channels of justice would be corrupted. Besides, the king is the party accusing, and consequently cannot be the judge; for the very act of complaining, presupposes an opinion that the party complained of is guilty. Hence it is that the grand jurors, who make presentment, are disqualified ultimately to decide upon the fact.

In this state the judges are appointed by both houses of assembly, in a grand committee. In this

respect, they resemble the king; and therefore cannot try the judges upon a criminal charge. In the present instance, both houses of assembly are the party complaining; in this respect also, they resemble the king, and so cannot be the triers. For, with deference to the legislators present, there may be an assembly, whose interested views might induce them to establish systems totally subversive of the constitution, and of political as well as civil liberty. To effect which, the supreme judiciary must be the creatures of their power; and such creatures they would finally be, were the judges to be appointed, accused, and tried by them.

Let the human heart, and, as I have the honor of addressing myself to some who profess, and even attempt to teach the doctrines of christianity, the conscience also, be consulted upon this question. Should not the parties litigant be equally indifferent to the judge, who is to decide upon their controversy? Why is it, that jurors may be challenged, and removed, for favor, but that the mind should be perfectly unbiased, and open to the reception of truth? Why, like Cæsar's wife, should they be incapable of being suspected, unless that the parties themselves might feel a perfect confidence in their judges? Can that confidence be placed upon this occasion? Has not the matter been taken up rather in a political than a juridical point of view? I do not assert; but has it not been determined, in a convention of part of the members, to remove the judges, and appoint others who will execute, at all events, the penal acts? Has not one town in par-

ticular proceeded so far, as to instruct its deputies to use their utmost influence in bringing the judges to punishment?[1] Can these members be considered as impartial triers? Is it possible to suppose, but that the influence of their constituents will have some weight in forming their opinion? Can they be objected to, as having prejudged the cause? If they cannot, is there not a moral certainty of condemnation? If they can, will not the objection be so far extended, as to prevent the possibility of a legal decision?

Be entreated, therefore, O ye guardians and protectors of the people, seriously to reflect upon the magnitude of the present question, and the important events that may result from your determination. "The Great Judge of all the earth, can he do wrong?" Of beings rational, He requires the "heart." And "as a man believeth in his conscience, so is he." Submit then to the heavenly standard. And, as the judges have acquitted themselves conscientiously, in the sight of God and man, add to the general plaudit, which shall waft their names upon the wings of immortal fame, to the latest posterity.

[1] This probably refers to a vote of the town of Coventry, instructing their representatives to "use their influence in the general assembly, that the judges of the superior court be dealt with according to the nature of their offence, in giving their determination in the case John Trevett *v.* John Wheeden, in which determination it was thought by the town, that the said judges exceeded the bounds of their jurisdiction by giving their determination that the law made by the general assembly of this state was unconstitutional, when it was the duty of said court to have given their judgment, whether the said John Wheeden was guilty of a breach of the law of this state or not."

The memorial of the judges and the address of Varnum seem to have made a decided impression on the house. A calm and rational debate ensued, in which the asperities of party feeling were laid aside, and members expressed a sincere desire to take such a course, as should vindicate the honor of the law and the dignity of the state. A motion was made and agreed to, that the opinion of the attorney general be taken, and the sentiments of the other professional gentlemen requested, whether constitutionally, and agreeably to law, the general assembly could suspend, or remove from office, the judges of the supreme judiciary court, without a previous charge and statement of criminality, due process, trial, and conviction thereon?

William Channing, the attorney general,[1] ob-

[1] William Channing was born at Newport, in 1751, and was graduated at Nashua Hall, Princeton College, in 1769. He studied law with Oliver Arnold, at Providence, and was called to the bar in 1771. In 1773, he was married to Lucy Ellery, a daughter of William Ellery, of Newport, one of the signers of the declaration of independence. In early life he filled many honorable offices in Rhode Island, and in 1777, he was elected attorney general of the state. To that office he was annually chosen until 1787, when he lost his election in consequence of his earnest opposition to the paper money laws. In 1791, however, he was again elected attorney general, and held that office, together with the office of district attorney of the United States, until his death, in 1793. He was an able advocate, and well read in the law, especially in the science of special pleading. His manner of speaking at the bar was rapid, vehement and impressive. His practice was extensive, and he led the bar for several years before his death. He had eleven children, one of whom was the late eminent William Ellery Channing, D.D., of Boston. A letter of this distinguished clergyman to Mr. Updike is inserted in the Memoirs of the Rhode Island Bar, and is worthy of a place here.

"BOSTON, Dec. 18, 1841.

"*My Dear Sir*, — I received, with great pleasure, your letter of last

served, that as it was at all times his duty, so he derived a peculiar pleasure, in rendering to the legislature every legal assistance in his power. He had

month, in which you inform me that you are preparing 'the Biography of the Rhode Island Bar,' and request me to furnish any materials in my power for a memoir of my father. My recollections of my father are imperfect, as he died when I was thirteen years of age, and I had been sent from home before that event. But the many testimonies which I have received to his eminence as a lawyer, as well as to his private virtues, make me desirous that there should be some memorial of him. My brother, Professor E. T. Channing, who is the antiquary of the family, has sent me, in a letter, which I enclose, such facts as he has been able to gather; and has also furnished me with a sketch of my father's character, prepared by my venerable grandfather, William Ellery. This, as you will see, is a tribute of affection; but my grandfather was remarkable for his honesty, which almost amounted to bluntness; and I am confident that his language, however strong, did not go beyond his convictions. I cheerfully add my own reminiscences, and a few facts.

"My father retained much attachment to Princeton College, where he was educated, so that he thought of sending me there. He was the classmate and friend of Samuel S. Smith, afterwards distinguished as a theologian, and as the president of that institution. In the last part of his collegiate days he enjoyed the instructions of the celebrated Dr. Witherspoon. His early marriage, and the rapid increase of his family, obliged him to confine himself rigidly to his profession. He was too busy to give much time to general reading, or even to his family. Still I have distinct impressions of his excellence in his social relations. He was the delight of the circle in which he moved. His mother, brothers and sisters leaned on him as on no other. I well remember the benignity of his countenance and voice. At the same time he was a strict disciplinarian at home, and according to the mistaken notions of that time, kept me at too great a distance from him. In truth, the prevalent notions of education were much more imperfect than in our day.

"I often went into courts, but was too young to understand my father's merits in the profession; but I had always heard of him as standing at its head. My brother says, that Judge Dawes used to speak of his style and manner as 'mellifluous,' but at times he was vehement; for I well recollect, that I left the court house in fear, at hearing him indignantly reply to, what seemed to him, unworthy language in the opposite counsel.

"His parents were religious, and the impressions made on his young mind were never lost. He was the main pillar of the religious society

attended the trial upon the information, without any bias or partiality upon his mind; and was happy in the conviction, that the whole conduct of the judges,

to which he belonged. The house of worship had suffered much from the occupation of Newport by the British army, so as to be unfit for use; and I recollect few things in my childhood more distinctly than his zeal in restoring it to its destination, and in settling a minister. I cannot doubt that his religious character received important aid from the ministry and friendship of Dr. Styles, who was as eminent for piety as learning, and under whose teachings he grew up. He had a deep, I may say peculiar, abhorrence of the vice of profaneness; and such was his influence, that his large family of sons escaped this taint to a remarkable degree, though brought up in the midst of it. I recollect, with gratitude, the strong impression which he made on my own mind. I owed it to him that, though living in the atmosphere of this vice, no profane word ever passed my lips.

"On one subject I think of his state of mind with sorrow. His father, like most respectable merchants of that place, possessed slaves imported from Africa. They were the domestics of the family; and my father had no sensibility to the evil. I remember, however, with pleasure, the affectionate relation which subsisted between him and the Africans, [most of them aged,] who continued to live with my grandfather. These were liberated after the revolution; but nothing could remove them from their old home, where they rather ruled than served. One of the females used to speak of herself as the daughter of an African prince; and she certainly had much of the bearing of royalty. The dignity of her aspect and manner bespoke an uncommon woman. She was called duchess, probably on account of the rank she had held in her own country. I knew her only after she was free, and had an establishment of her own. Now and then she invited all the children of the various families, to which she was connected, to a party; and we were liberally feasted under her hospitable roof. My father won the hearts of all his domestics. One of the sincerest mourners at his death, was an excellent woman, who had lived long with us, and whom he honored for her piety.

"I recollect, distinctly, the great interest he took in the political questions which agitated the country. Though but eight or nine years of age, I was present when the Rhode Island convention adopted the federal constitution; and the enthusiasm of that moment, I can never forget. My father entered with his whole heart into that unbounded exultation. He was one of the most devoted members of the federal party. At the beginning of the French revolution, he shared in the universal hope and joy which it inspired; but I well recollect the sadness

upon that interesting occasion, demonstrated the greatest candor and uprightness; and, according to his private opinion, their determination was conform-

with which he talked to us one Sunday afternoon, of the execution of Louis XVI.; and from that moment his hopes died.

"You speak of the testimony borne to him, by the late Elisha R. Potter, Esq. My father was among the first to discover the abilities of that remarkable man; and I remember the kindness with which he used to receive him. His spirit was, in truth, the kindest. He was ever ready to see and appreciate superior talents, and to attach himself to worth. His friendship seemed to me singularly strong, for a man so immersed in business. Among his friends, were George Champlin, Esq., a politician of singular sagacity, and who was said to have ruled the state for years, without forfeiting his integrity; Dr. Isaac Senter, a physician of extensive practice, who was thought to unite, with great experience, a rare genius in his profession, and whose commanding figure rises before me, at the distance of forty-five years, as a specimen of manly beauty, worthy the chisel of a Grecian sculptor; and the Rev. Dr. Hitchcock, of Providence, a man of great sweetness of temper, and who deserves the grateful remembrance of that city for his zealous efforts in the cause of public education. My father took a great pleasure in the society of ministers, and always welcomed them to his hospitable dwelling.

"I remember his tastes with pleasure. He had two gardens, one of them quite large, and as he sought to have everything which he cultivated of the best kind, our table, otherwise simple, was, in this respect, luxurious. He was not satisfied with what contented his neighbors, but introduced new varieties of vegetables into the town. He also took great interest in sacred music. On Sunday evenings the choir of the congregation, which included most of the younger members, and other amateurs, met in his office for practice in singing. The apartment, somewhat spacious, was filled; and the animation of the meeting, to which his zeal contributed not a little, made the occasion one of my weekly pleasures.

"As far as I can trust my recollections of my father's person, it must have been very prepossessing; but to me, his appearance, at the time, was more venerable than beautiful. His head was bald; and his cocked hat, and the other parts of his dress, which according to the fashions of the day, differed much from the costume of the young, made him seem from the first, an old man. He prospered in life, but without being able to leave a competence for his large family. His labors were great, but I have no recollection of seeing him depressed. I should place him among the happy. He was taken away in the midst of usefulness and hope. The disease of which he died, was not understood.

able to the principles of constitutional law. But, be their judgment agreeably to law or not, confident he was, that there would be a fatal interruption, if not annihilation to government, if they could be suspended, or removed from office, for a mere matter of opinion, without a charge of criminality. How that charge should be preferred and conducted, he did not presume to decide, as it might possibly be the subject matter of an after question, and was not contained in the present order.

Mr. Bradford then informed the house, that he was not present at the trial in Newport, nor had he attended to the proceedings of the legislature respecting the judges, excepting so far as related to the citation, and the memorial upon the table; till then, he never doubted but the general assembly were vested with constitutional authority, to try and remove any officer by them appointed, for any mal-

I remember that he used to complain of feelings which we now should consider as dyspepsy; but that disease was little thought of then, and the name never heard.

"These are very scanty reminiscences; but as I hardly saw my father after reaching my twelfth year, and as nearly fifty years have passed since that time, it is not to be wondered at that I can recall no more of his calm, uniform life. The career of a professional man, occupied with the support of a large family, offers no great events. But you may select a few hints from what I have now written, and I beg you to suppress everything which may seem to you unimportant. I little thought, when I began, of writing so much; but the pleasure which all men take in the virtues of parents, has led me on insensibly.

"My father died before I could requite him for his toils for my support, and his interest in my moral well-being; and I feel as if, in this present instance, I was discharging some part, though a very small one, of my great debt. I owed him much, and it is not my smallest obligation, that his character enables me to join affectionate esteem and reverence with my instinctive gratitude."

practices in his office; but from the observations that had been made, he very much doubted the propriety of his former opinion; one point, however, was clear and certain, that as the judges were commissioned and sworn for the term of a year, they could not be deprived of their powers during that term, but by regular impeachment, in which the charges against them must be particularly stated; a trial, in which they would have an undoubted right for time to prepare their defence, and to be heard by counsel; and condemnation, upon full proofs of the charges. In the proceedings now before the house, there was not a charge, or the appearance of one, against the court, to which they could, in any manner, be held to answer. He was really astonished, that so much time should be taken up in needless inquiries, and fruitless altercations. He had been honored with a seat, in one or other of the houses of the assembly, for upwards of thirty years, and could not recollect a period, in which harmony and unanimity were more essentially wanting, than at the present time. The people of this state had been well governed; they had been a happy people, and might still be as happy as any on earth, if all party contentions could be laid aside, and every one strive to soothe the cares, and heal the wounds, of his neighbors. He besought, he entreated the members to embrace the present moment, in which there seemed to be a spirit of conciliation, to put an end to all further contentions among themselves, but what might arise for the sake of information. And, as they regarded the honor, the peace, and the safety of the

state, that they would discharge the judges from any further attendance, and apply themselves in earnest, and with one mind, to such measures as would render them happy at home, and respectable abroad.

Mr. Helme remarked, that the subject was new, and he was not fully prepared to give an opinion. But at present, he inclined to think, that there was no constitutional law by which the question could be solved. It must, therefore, be in the breast of the general assembly to point out the mode of trial by an act for that purpose, should a trial be thought necessary. If they should proceed to try the judges, either by themselves, or a court to be specially appointed for that purpose, they must cause them first to be impeached, and state the facts particularly upon which the impeachment is founded. The common law would direct the manner of process; and should they be found guilty, they could not be removed from their office, but by a bill, in nature of a bill of attainder, which must pass both houses, and be enacted into a law.

Mr. Goodwin fully acquiesced in the opinions already given, that no sentence could be passed against the judges, but by regular process, in which a specification of the charges was essentially requisite.

The matter was further discussed by Henry Marchant and Benjamin Bourne,[1] who defended the positions taken by the attorney general. It was then

[1] Benjamin Bourne was the first representative to congress under the constitution. He was afterwards a circuit judge of the United States court.

resolved, by a very large majority, that the three judges, having been fully heard before the assembly, had rendered no satisfactory reasons for their judgment in the case of Trevett against Wheeden; but as they were not charged with criminality in giving their judgment, it was voted that they be discharged from any further attendance upon the assembly on that account. The laws which had given rise to this famous controversy were soon afterwards repealed, and a better feeling prevailed in regard to the true principles of government.

TRIALS OF JOHN HAUER AND OTHERS,

BEFORE THE

COURT OF OYER AND TERMINER,

FOR THE MURDER OF FRANCIS SHITZ.

PENNSYLVANIA, 1798.

Few events in Pennsylvania ever caused more excitement and alarm amongst the German population, than the murder of Francis Shitz, in 1797. The trials of the parties, implicated in this singular transaction, are interesting, as exhibiting the low state of public morals at that day, in the interior of the state, especially amongst the foreign population; and, also, as involving some legal points of great importance in criminal law. A very full report of these trials was published at the time, making an octavo volume of one hundred and sixty-three pages, of which the title page was as follows: "A Correct Account of the Trials of Charles M'Manus, John Hauer, Elizabeth Hauer, Patrick Donagan, Francis Cox, and others, at Harrisburgh, June Oyer and Terminer, 1798, for the Murder of Francis Shitz, on the night of the 28th December, 1797, at Heidelberg township, Dauphin county, in the Commonwealth of Pennsylvania. Containing the whole evidence, and the substance of all the law arguments in those celebrated Trials."

TRIALS OF JOHN HAUER AND OTHERS.

On the night of December 28, 1797, a murder was committed at Heidelburg township, in Pennsylvania, under circumstances of great atrocity. A female in the family of Francis and Peter Shitz, being awakened by some noise in the house, was attracted by a light in the kitchen, to which she proceeded, and saw two men, who seemed to be in disguise, their heads being bound up in white handkerchiefs. She immediately returned to the room, where Francis Shitz was sleeping on a bench before the stove, to inform him of her discovery. The strangers had followed her, and at the moment when she seized Shitz by the arm, a pistol was fired at his head, which took immediate effect, covering the person of the woman with blood, and extinguishing the light which was held by one of the murderers. One of the men deliberately proceeded to the kitchen for another light, from which he returned with an axe, and commenced a

ferocious attack on the fallen man, holding the light in one hand and the weapon in the other. They then rushed upon the woman and three boys who were in the room; but the light being again extinguished, the latter were enabled to escape. The men having obtained another light, and being both armed with axes, proceeded to the chamber of Peter Shitz, a youth of eighteen years, whom they dragged from his bed, giving him several wounds. The young man made a powerful resistance, and succeeded in escaping from the house. The neighbors being aroused, came to the house, where they found Francis Shitz weltering in his blood. He had been shot in his right ear, and had four wounds on his head by the axe. A pistol was found in the room, which had evidently been recently discharged. The unfortunate young man lingered in great agony until the next morning, when he died.

This murder was not long enveloped in mystery. It was evident that the object was not plunder, because nothing had been taken; and the causes of the act were to be sought in some other motive. Who, then, had an interest in the death of these two young men? The question was soon solved, and suspicion was directed to John Hauer, who had married their sister.

Hauer was born in Pennsylvania, of German parents. A few years before the event above alluded to, he had married the only daughter of Peter Shitz, a wealthy German of Heidelburg township, who died in 1795. By his will, Shitz had devised to his daughter Elizabeth, the wife of Hauer,

one thousand pounds, but the advancements he had previously made to her were to be considered as a part of that legacy. The whole residue of a very large estate he had bequeathed to his two sons, Francis and Peter; with the provision, that in case of the death of either of his sons under age, or without issue, his share should go to the surviving brother, paying, in such an event, five hundred pounds to the daughter. Francis Shitz had recently attained the age of twenty-one years; Peter Shitz was eighteen years old. Hauer was very much dissatisfied with the will of his father-in-law, and entered a *caveat* against its probate, which he subsequently withdrew. He then endeavored to persuade the young men to make an equal division of the property, and entered into various expedients to accomplish this purpose; one of which was a pretence that the ghost of their father had appeared to him, and would not be appeased until the sons had agreed to set aside the will. This story failing to make the desired impression on the young men, Hauer next endeavored to work on their fears, by a clumsy contrivance to raise a ghost in their own house, in which his agency had been exposed.

Hauer and his wife were suspected of the murder, on the morning after it was committed, and a large number of the neighbors proceeded to his house. They brought himself and his wife to the room where Francis Shitz was then lying. Mrs. Hauer fell down at the bedside and wept bitterly. Her husband sat down and made no remark. The maid insisted that the young man had been shot, but the head had

been so cut, that a pistol shot wound could not at first be discovered. Hauer suggested that he might have been shot in the mouth. He said nothing more, but seemed very dejected.

The pistol which was found in the room was known to have been in the possession of Charles M'Manus, an Irishman, and he was arrested, together with Peter M'Donoghy, Patrick Donagan and Francis Cox, all of whom had recently arrived in the United States from Ireland. M'Manus made a confession, in which he charged Hauer and M'Donoghy as being present, doing the murder, at the house of Shitz, whilst he held their horses at the end of the lane. He represented the other prisoners as being also engaged in the plot.

At the March term of the court of Oyer and Terminer and General Gaol Delivery, at Harrisburg, before Joseph John Henry, president, and John Gloninger, his associate, an indictment was found, in which Hauer and M'Donoghy were charged as principals, and Donagan, Cox, Hugh M'Donough and Elizabeth Hauer, as accessories before the fact. John Hauer was first put upon trial, and after it had proceeded a considerable length of time, he expressed an earnest desire to speak with the judges. The court was then adjourned, and the judges visited the prisoner in jail, where he made a full confession of his own guilt, as an accessory before the fact, insisting that the murder was actually committed by M'Manus and M'Donoghy, and that the other prisoners were accessories before the fact. He persisted in this confession in open court, on the next day,

whereupon the court, on motion of the counsel for the commonwealth, discharged the jury from a further hearing of the case, and remanded the prisoner, in order that a new indictment might be sent up, according to Hauer's confession. The counsel for the prisoner declined interfering, on the ground that the prisoner had taken himself out of their hands, his confession being an act of his own, without consulting them.

At the next Oyer and Terminer, in June, 1798, a new indictment was found, in which M'Manus and M'Donoghy were charged as principals, and Hauer, his wife, Donagan, M'Donough and Cox were charged with being accessories before the fact. M'Manus and M'Donoghy were first placed at the bar, and pleaded not guilty. The trial of M'Manus commenced on June 13. The names of the jurors were, Michael Urich, Samuel Sturgeon, Daniel Longenecker, Henry M'Cormick, Obed Fahnestock, John Stoner, John Boyd, John Blattenberger, William Snodgrass, Henry Stoner, John Gray, Samuel Finney.

The evidence against the prisoner was partly circumstantial, but seemed conclusive as to his guilt. The pistol, found in the room where the murder was committed, had been seen in his possession. It also appeared, that a short time before the murder, he had made mysterious hints as to a plot to injure the Shitzes. On the night it was committed, he had gone to bed in a tavern with Cox, several miles from the scene of the murder; but he left the house in the night, and was absent several hours. His confessions were also read to the jury. They were four

in number, and were contradictory in some material respects. In one of them he denied that he was present at the transaction, but admitted that he held the horses of the murderers while the deed was done, and declared that they were to be paid eleven hundred pounds for the job.

Mr. Montgomery and Mr. Patterson, who had been assigned by the court as counsel for the prisoner, declined to address the jury. They suggested, however, that the confessions should be taken together, and from them it would appear that the prisoner was not present at the murder, but nearly a mile distant. Of course he could not be convicted on this indictment, but ought to be considered as an accessory before the fact.

The counsel for the commonwealth, in reply, stated that the confessions were so contradictory, that they could not be reconciled. In their apprehension, the evidence was sufficient to show that the prisoner was actually present at the murder; but admitting the prisoner's statement, that he was holding the horses, it would make no difference in the result; for it was not necessary that he should have been the person who fired the pistol, or struck the blows, or even that he was an eye witness. If in any way he was aiding the general design, although at a distance, it was a sufficient presence to make him a principal.[1]

[1] Foster's Crown Law, 349. See also the case of *Commonwealth* v. *Knapp*, tried in Massachusetts, in 1830, where it was held, that to be *present*, aiding and abetting the commission of a felony, the abettor must be in a situation where he may actually aid the perpetrator; it is not enough that he is at a place appointed, where the perpetrator erroneously supposes he might render aid. Pickering's Reports, ix. 496.

The jury, after an hour's absence, returned a verdict of guilty of murder in the first degree.

The court then proceeded to the trials of Hauer, Donagan and Cox. When Hauer was arraigned he stood mute, and his counsel moved, that he be not required to plead, but that he be forthwith discharged, in consequence of the proceedings at the former trial. The prisoner was indicted at the last term of the court as a principal. He was then arraigned and pleaded not guilty. A jury was sworn, testimony given in, and afterwards the jury was discharged without giving a verdict. His counsel now contended, that after such a discharge, he could never again be put upon trial for the same offence. The present indictment was, in fact, for the same offence. Principal and accessory before the fact were substantially the same; and if one was acquitted as principal, he could never be indicted again as accessory before the fact. The counsel further contended, that a jury once discharged in a capital case, amounted to an acquittal of the prisoner, and he could not be put a second time upon his trial for the same offence.

This point was most elaborately argued by Mr. Fisher, Mr. Clymer, and Mr. Duncan, for the prisoner; and by Mr. Hall and Mr. Smith for the commonwealth.

The counsel for the commonwealth insisted, that the proceedings at the former trial were in all respects according to law, and formed no bar to the present indictment. It was in consequence of the prisoner's own act that the jury was discharged, in

order that a new indictment might be found, better suited to the truth of the fact. It was true, that no man should be twice put in jeopardy of life or limb. They also admitted, that a jury ought not to be discharged without the prisoner's consent, merely because there was not sufficient evidence to convict him upon that indictment, and in order to procure more full proof at a subsequent trial, as was done in the case of Whitebread and Fenwick,[1] which they hoped might never again be drawn into example. But that the court, under no circumstances, even when the purposes of public justice required it, and where, without the exercise of such a discretion, the most atrocious offender might escape, possessed such a power, was a doctrine they could not accede to. For where, either through the ignorance or inattention, or by the mistake of the prisoner, a bill was sent up, charging one grade of crime, and it turned out upon the evidence, that the prisoner was guilty of another grade of the same crime; there was no case which went so far as to establish, that the jury

[1] 31 Car. 2, 1679. See the case of *Commonwealth* v. *Cook*, tried at Philadelphia, in 1822, (Sergeant and Rawle's Pennsylvania Reports, vi. 577.) See, also, the case of the *United States* v. *Gibert*, tried at Boston, in 1834, (Sumner's Reports, ii. 19,) where it was held by Mr. Justice Story, that the prohibition in the constitution of the United States, "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb," means, that no person shall be tried a second time for the same offence, after a trial by a competent and regular jury, upon a good indictment, whether there be a verdict of acquittal or conviction. Therefore, the circuit court of the United States cannot grant a new trial in a capital case, after a verdict regularly rendered upon a sufficient indictment. Davis J. dissenting, held that the privilege, intended to be secured by the prohibition, might be waived by the prisoner.

should not be discharged, in order that a new bill might be sent up, adapted to the facts and circumstances attending the commission of the crime. It was true, that where a man was acquitted upon an indictment, he might plead such acquittal in bar of any subsequent accusation for the same crime. But, then, he must be found not guilty on an indictment *free from error*. For if his life was never in jeopardy, as where he is acquitted upon an ill indictment, upon which he could not have been convicted, or if convicted could not have been punished, the plea of *autrefois acquit* or *convict*, is no bar to another indictment. Now, in the present case, the first indictment *was defective*, and if the prisoner had been acquitted upon that indictment, it would not have availed him, and if he had been convicted he never could have been punished upon it. The defect was this, that it was not alleged that Shitz died of the wound received. The words were, "of which said mortal wound he the said Francis Shitz, from the night of the said twenty-eighth December in the year aforesaid until the twenty-ninth day of the said month of December in the said year, at Heidelberg township in the county aforesaid, and within the jurisdiction of this court did languish, and languishing did live, on which said twenty-ninth day of December in the year aforesaid, he the said Francis Shitz, at the place aforesaid, and within the jurisdiction of this court, did die" — omitting the words, "of the mortal wound aforesaid." However absurd this objection might appear to the grammarian, the

law required this technical precision, and that was an end of the question.

The court overruled the motion of the prisoner's counsel, and ordered Hauer to plead to the indictment, on the ground that the indictment on which he was first arraigned was defective, there being no averment that Shitz died of the wounds he received. The court rested their decision on this point alone, considering it unnecessary to decide the other, but they remarked, that if this were a case similar to that of Whitebread and Fenwick, they should not hesitate to declare, that to discharge a jury after they had been sworn, and to postpone a trial for the sake of getting better evidence on a second occasion, without anything more in the case, was detestable, and ought never to be practised.[1]

The prisoner, when asked whether he was guilty or not guilty, remained silent, and the court adjudging that he stood mute from obstinacy, ordered the plea of not guilty to be entered on the record. The three prisoners, Hauer, Donagan and Cox, were then tried together. The names of the jury were,

[1] The reader will perceive that the court avoid a decision upon the propriety of their proceedings at the first trial. It does not appear that the flaw in the indictment was then discovered, and the conduct of the judges in visiting a prisoner in jail, while on trial for a capital offence — receiving from him a confession, and ordering the jury to be discharged in order to enable the prosecuting officer to frame a new indictment, to meet the particular circumstances disclosed in the confession, is surely worthy of note, notwithstanding their pointed condemnation of the doctrine laid down in the case of Whitebread and Fenwick, where the court decided that it was in their discretion, to discharge the jury without taking a verdict, where witnesses were wanting, or where there was any accident of the like nature.

Thomas M'Elhany, Samuel Sturgeon, John Blattenberger, Henry M'Cormick, Samuel Cochran, William Crane, John Wilson, Jun., John Norton, John Parthimer, James Johnson, Henry Fulton, John Snodgrass.

The evidence against Hauer was in part the same as that offered in the trial of M'Manus. In addition, however, was his own confession, which left no doubt as to his guilt, and the depravity of his character. It also appeared, that he had made various attempts on the life of the brothers of his wife, which were not successful. On one occasion, he practised upon the credulity of Peter Shitz, in a manner that would appear ludicrous, if it did not display a deplorable state of ignorance on the one hand, and hardihood on the other. The testimony of the latter was as follows:

Peter Shitz. Three years ago against next harvest, my brother Francis went to haul stones for the new church at Shæfer's-town. When he came home he could not unhitch his horses. He thought the rest of us were not so sick, that we might do it; and he sent for us to the field, where we went to rake oats to feed the horses, but we could not do it. Hoffman and the girl, that is now his wife, and two other girls, and Hoffman's son John, were in the field. We were all so sick we vomited all the time. Hoffman was not quite so sick as the rest of us, and he fed the horses. The vomiting continued all that day; and the next day we felt very weak. Hoffman's wife, who was then a maid in the house, cooked the breakfast that day; it was coffee and

bread and butter. We never had been so affected before. I don't know if any strange person had been about the house that day. Hauer often came there about that time; I cannot tell how often; but he went about the house wherever he pleased.

"Last fall was a year I had hired myself to Jacob Shitz, my father's brother's son, at Tulpehocken. Hauer, with whom I then lived, had gone over to Francis Shitz's. When he came back, I told him I was going on Sunday to Jacob Shitz's. On Sunday it rained, and I could not go. Hauer then told me I should not go, that he would show me a way how I should get a purse every morning, that would have five doubloons in it. That he himself could not get it, but that I could. I said to Hauer that I could not get it. Hauer then swore unmercifully that I could; and he told me he must fetch drops from Lebanon. He went on Monday up to Lebanon. When he came back again he said one sort was wiederkomme drops, the other I don't know what it was he called it. He had three bottles, one was bigger than the other two, which were but small phials. Hauer said, now we will try something. I said I did not wish to do it, I would rather not. Hauer told me I should try it, he would be bail to me nothing should happen to me. Hauer told me that Shæfer and Bomberger [they were the executors under Peter Shitz's will, and the guardians of young Peter] wanted to bind me out, that they were at his house, and wanted to get me, and told him they would have me dead or alive. He scared me so much that I hid myself; because he said they came every day. I told Hauer

he lied. He swore again unmercifully, that he did not. I then kept myself concealed still. Then Hauer said, we will try to get the purse; and he drank some of the drops; and I drank some of them too. He drank out of the big bottle, which he said were wiederkomme drops, I drank of the same. I drank also out of the two small phials, but I don't know if Hauer drank any out of them or not. I did not see him do it. Then Hauer said he would not try that night, he thought it was not worth while.

"Some time after this, we went together down to Wolfersberger's barn. Solomon Hauer went along with us. John Hauer said, if we would not do as he told us he would give us an unmerciful beating; if we would not tie ourselves up as he told us, he would show us some other things. He then told us that we must tie ourselves up on the loft, with halters round our necks, and fasten the rope to the joist; that then he could tie that one who was to bring the purse in the same way. When I had tied myself, and fastened the rope to the joist, Solomon told me he would hold me; and then he gave me a push down. The rope was round my neck; the end fast to the joist above. The rope was not long enough to reach to the floor. The rope broke, and I fell down on the threshing floor. The rope was as thick as my little finger, and it was doubled. It had been used for a plough line, and to tie the horse. I did not see the man with the purse. The rope was doubled round my neck. The joist is eleven or twelve feet above the threshing floor. The rope took the skin off my neck, but did not hurt me

much. Solomon said he would tie a rope round his neck, but he did not do it. Soon as Solomon pushed me down, he jumped down and ran off. I went home to John Hauer's house. In about fifteen minutes after, John Hauer and Solomon Hauer came in together. They said they were very sorry that it happened so that all went wrong. After that Solomon asked me to go towards Bethlehem with him, where he lived. John Hauer told me I should go along with him, that it might not be found out that the skin was off my neck. John Hauer often told me I should tell nothing of it, and I promised him I would not. When I came from Bethlehem I hired myself to my brother Francis, and Hauer again told me not to tell. I then lived with Francis almost a year, till he was murdered."

The testimony against Donagan and Cox was circumstantial. They were implicated in the confession of Hauer, but this could not be used against them at the trial. It appears to have been a part of the plot, for each of the prisoners to sleep on the night of the murder with some one who could testify to an *alibi*. Hauer had requested a man to sleep in his house, and in the room with him during that night. But the witness testified that Hauer might have been absent while he was asleep. Donagan went several miles from the place of the murder to sleep, and the person in whose house he staid had no doubt that he was within doors the whole night. Cox and M'Manus came together to the tavern of one Geiger, several miles from the scene of the murder, and went to bed together. In the night

M'Manus was discovered leaving the house, although he evidently wished to be unnoticed. He was absent so long as to alarm the taverner, who with his wife made diligent search for him in the neighborhood; but his bedfellow, Cox, was not disturbed by his absence, although it was a cold night and M'Manus went out thinly clad. Cox got up and assisted in the search, at the urgent request of Geiger and his wife, but he manifested no anxiety or alarm. M'Manus came back before morning, and made some trifling excuse for his absence. It was proved that he wore Cox's shoes, and some other article of personal apparel. These circumstances were relied on, as showing that Cox must have been cognizant of the murderous intention of M'Manus when he went out. There were other circumstances which made against the prisoners, but it is not deemed necessary to refer to them with more particularity here.

After the testimony was closed, the counsel who had been assigned to Hauer — Mr. Duncan, Mr. Elder, Mr. Laird, Mr. Fisher and Mr. Clymer — made a statement to the court of the following purport. They averred, that on this, as well as on the former trial, they had endeavored to discharge their duty towards him faithfully, to the extent of their slender abilities. They believed that if Hauer, on the former trial, had not thought proper to take his case out of their hands, probably he would not now have been in confinement. But as he sent for the judges, and confessed his concern in the very foul and barbarous murder committed on his brother-in-law Francis Shitz, and had, when brought to the bar

the next morning, publicly pronounced the truth of that confession, and persisted in it; and as he had, during the proceedings, and upon his arraignment, upon the present indictment, remained mute; whether obstinately, or by the visitation of God, they pretended not to say; and further, had declined all intercourse with his counsel; having attended the trial, and examined the witnesses; they therefore, considered it their duty to be silent, and now deliver up the prisoner to the court and to the jury, well satisfied that the court would consider and give weight to any favorable circumstance, that might exist in his case. They were induced to this measure from a sense of its propriety, from a respect to the court, and a regard to their own characters. They would, however, have it understood, that they have not been awed into it, by the dread of popular resentment and fury, which may have been excited against them for the part which they have taken in defence of Hauer; this they most heartily despised. For though he stood at the bar covered over with the blood of his brother, it would have been their duty to have become his counsel; and having once undertaken his defence, not to have defended him with their best exertions, would have been a violation of their oaths, a base desertion of a man who had put his life in their hands, and have rendered them unworthy members of a very honorable profession.

The case of Donegan and Cox was then argued to the jury, on *Sunday*, with great ability, by Mr. Elder, Mr. Clymer and Mr. Hopkins, for the prisoners, and by Mr. Hall, Mr. Smith and Mr. Henry for the com-

monwealth. After which, the president of the court charged the jury to the following effect:

Gentlemen of the jury,

The indictment upon which you are now trying the prisoners at the bar, charges Charles M'Manus and Peter M'Donoghy as principals; and the prisoners as accessories before the fact. Charles M'Manus has been already convicted. But whether the present prisoners at the bar were partakers of the guilt, as accessories before the fact, you are now called upon to determine. The murder of Francis Shitz certainly roused the indignation of the county. Its atrocity is unequalled by anything of the kind hitherto known in Pennsylvania. The execution of the murder was as horrid, as the motives were base and grovelling. The keenest sensations must arise in the minds of all good men, and worthy citizens, that in a government of laws, predicated on the ground of freedom, where the security of our persons, and the protection of our property, are the primary objects of legislation, a massacre should take effect, that would disgrace the manners and government of the most savage people!

It is proper, gentlemen, that this sensation in the public mind should be increased and exhilarated; to cause us collectively, and individually, to become more circumspect in our observance of the conduct of each other, and more watchful of strangers. But, gentlemen, in the relative situations we now hold; called upon by the laws of our country to decide upon the life and death of fellow men, we have a

different part to act. Sitting as arbiters of the fate of these men, we must divest ourselves of all prejudices we may have imbibed, from stories told out of doors. We must disregard all apprehensions of ill-will from particular persons, or any dangers that may arise to us from popular rage.

Here occupying the situations of judges and jurors, it is a sacred duty, that each of us should permit his understanding to be ruled and guided only by the evidence which has been laid before us; and that evidence only, which is acknowledged and received by the laws of our country as genuine, should have an operation on your minds. Evidence which the law pronounces to have no weight, though it should, from the necessity of the occasion, come into the view of the jury, must, when they are informed that it is legally ineffective, be laid totally out of the question. Nothing, indeed, should induce a conviction in a case of murder, but evidence legal in itself, fairly and openly delivered in court. Passion, prejudice, and the rumors of the country, should be done away. Cool inquiry; a deliberate examination and comparison of the circumstances one with the other, with a zeal for truth, ought to assume their places.

Here, I think it proper again to observe, that the confession of one prisoner, though it names others of the prisoners as being concerned with him in guilt, ought not to operate as evidence to convict those other prisoners. There is great reason in this rule of law. A man who has himself been guilty of an offence, ought not to be permitted to criminate another, in the absence of that other; and when the

prisoner, who makes the confession, may have abandoned all hope of salvation here and hereafter; or perhaps because he may have given himself up to a rage against the person whom he charges.

The prisoners are arraigned before you as accessories before the fact to Charles M'Manus, who stands convicted of the murder of Francis Shitz. The law defines an accessory before the fact, to be "one who, being absent at the time the crime is committed, does yet procure it to be done; — counsels with another to do it, — or commands it to be done." It is necessary to constitute this offence, that the prisoner should have been absent at the time of the commission of the offence. For if he be present, aiding or abetting, he is then a principal. A man may also be an accessory before the fact, though he does not communicate with the person who does the felony. As where A prevails upon B to procure C to poison or kill D. If C does kill D, A, though he never spoke to C upon the subject of the intended felony, is as much an accessory, and is as highly punishable as B, who procured C to do the act.

As to the evidence before you, I shall recapitulate the prominent parts of it, as it respects each of the prisoners, as they stand in order in the indictment. Having done this without comment, I must leave it to you to draw your own conclusions. It is not the duty of judges, in cases like the present, to press arguments for conviction, which do not strike the mind so forcibly, as at once to satisfy of guilt. As to Hauer, gentlemen, when you consider the testimony relating to his malice against the deceased, and his

brother before the murder: his behavior immediately before the death of Francis Shitz, and after, and all this accompanied by his own confession; you can have no hesitation, but that against him there must be a verdict of guilty. As to Donagan and Cox, the evidence is merely circumstantial and presumptive. When this kind of evidence, unaccompanied by anything positive, is brought before a jury to induce a conviction for murder, it ought to be received and acted upon with great caution.

Though even probable presumptions, which may be drawn from a variety of circumstances attending a crime, will authorize a jury in any case, whether of the highest or lowest kind of offences, to convict; yet as circumstances, particularly when few in number, are sometimes uncertain and fallible, it is certainly prudent for the judicious and conscientious juror, to scrutinize all the circumstances minutely. If, upon such scrutiny, he can fairly make the conclusion of guiltiness, he ought to do it firmly, and without fear of consequences. On the contrary, if hesitation and doubt remain, upon contrasting all the occurrences brought before him in evidence, the juror should as firmly and fearlessly pronounce the prisoner not guilty. It is an excellent sentiment of a great lawyer and a most pious man, the famous judge Hale, that in cases of presumptive evidence, it is better that five guilty persons escape, than that one innocent suffer.

The judge then went into a particular detail of all the evidence that had been given, and committed the case to the jury, at four o'clock on Sunday afternoon.

At seven o'clock in the evening,[1] they returned a verdict of guilty as to Hauer, and not guilty as to Donagan and Cox.

Elizabeth Hauer and Hugh M'Donough were then put upon trial, but the commonwealth offered no evidence against them, and they were acquitted. Peter M'Donoghy was also discharged by *habeas corpus*, as "it was not thought prudent to try and acquit him, from a full persuasion of his guilt, and with an expectation that sufficient evidence might hereafter appear to convict him."

M'Manus and Hauer were executed on Saturday, July 14, 1798. The former maintained to the last that he was not in the house, or present at the murder; but that he held a horse at the end of a lane, in order to aid the escape of the perpetrators, who were, he said, Hauer and Peter M'Donoghy. He appeared with the same manly and even cheerful resignation, which he had invariably preserved during his trial and imprisonment; and which, added to his youth, had, notwithstanding the atrocity of his crime, procured him no inconsiderable degree of the public sympathy and favor. The deportment of Hauer was more decent and composed than was expected from his conduct since his trial and condemnation, during which time he was never known to speak, although every exertion was used which humanity could dictate or art de-

[1] In the case of *Respublica* v. *Oswald*, in 1788, (Dallas's Pennsylvania Reports, i. 327) Chief Justice M'Kean says; "In criminal matters Sunday has always been deemed a legal day."

vise. He persisted in remaining in the most indelicate and filthy situation, not admitting the least covering to his nakedness, and attempting at every opportunity to bite those who came within his reach; one person was badly wounded by him in this manner. No question of insanity was raised at his trial, or in any of the proceedings, and it was generally supposed that his singular conduct was entirely feigned, but he was at least consistent, and sustained the concluding scene without opening his lips. It seems probable, that he was mute at first under the influence of a sullen obstinacy; but it was supposed that he at length lost the power of speech through extreme terror, or a feeling of the hopelessness of his situation. Nor is it impossible, that remorse for his crime may have shrouded his mind with a species of insanity, from which the murderer is never entirely free.

APPENDIX.

TRIAL OF MRS. SPOONER AND OTHERS.

The case of Mrs. Spooner and others, which stands first in this volume, involved several points of novelty and importance in criminal jurisprudence. It is deemed proper, therefore, to insert most of the documents relating to that matter; and transcripts of the originals, in the state archives of Massachusetts, have accordingly been made. There are but two papers relating to the trial amongst the records of the court, one of which is the coroner's inquest, and the other the indictment. The former was taken at Brookfield, on March 3, 1778, before Thomas Gilbert, coroner, and the following jurymen, namely: Jonathan King, Obadiah Cooley, Richard Wellin, Francis Foxcraft, Moses Dorr, Seth Banister, Benjamin Jennings, John Waite, Elias Staples, Adoniram Walker, James Upham, Wm. Hincher, Asa Bigelow, and Comfort Old. They returned that the deceased, "on the evening of the first of March, about 9 o'clock, being returning home from his neighbors, near by his own door was feloniously assaulted by one or more ruffians, knocked down by a club, beat and bruised, and thrown into his well with water in it."

INDICTMENT.

Worcester ss. At the Superior Court of Judicature, Court of Assize and general Gaol delivery, begun and holden at Worcester, within and for the County of Worcester, on the Tuesday next preceding the last Tuesday of April, in the year of our Lord seventeen hundred and seventy-eight.

The Jurors for the Government and People of Massachusetts Bay, in New England, upon their Oath present that William Brooks, resident at

Charlestown, in the County of Middlesex, Labourer, James Buchannon, of the same Charlestown, Labourer, and Ezra Ross, of Ipswich, in the County of Essex, Laborer, not having GOD before their eyes, but being moved and seduced by the instigation of the Devil, on the first day of March last past, with force and arms, at Brookfield aforesaid, in the County aforesaid, feloniously, wilfully and of their malice aforethought, in and upon Joshua Spooner, of said Brookfield, then and there in the peace of GOD and of the said Government and people being, an assault did make, and that the aforesaid William Brooks, with his right fist the said Joshua Spooner to and against the Ground then and there feloniously, wilfully, and of his malice aforethought, did strike down, and the same Joshua Spooner so on the Ground lying, he, the said William Brooks, with both his hands and feet of him, the said William Brooks, in and upon the back, head, stomach, sides and throat of him, the said Joshua Spooner, then and there feloniously, wilfully, and of his malice aforethought, did strike, beat and kick, giving to him, the said Joshua Spooner, as well by the striking down of him, the said Joshua Spooner, to the Ground as aforesaid, as also by the striking, beating and kicking the said Joshua Spooner in and upon the back, head, stomach, sides and throat of him, the said Joshua Spooner as aforesaid, with both the hands and feet of him, the said William Brooks, in manner aforesaid, several mortal bruises, of which said several mortal bruises the said Joshua Spooner there instantly died. And that James Buchannon aforesaid, and Ezra Ross aforesaid, feloniously and of their malice aforethought, then and there were present, aiding, assisting, abetting, comforting and maintaining the aforesaid William Brooks, to the felony and murder aforesaid, in form aforesaid, to be done and committed. And so the Jurors aforesaid upon their oaths do say, that the said William Brooks, James Buchannon and Ezra Ross, the aforesaid Joshua Spooner, at Brookfield aforesaid, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, killed and murthered, against the peace of the Government and people aforesaid. And that Bathsheba Spooner, of Brookfield, in the County of Worcester, Widow, late Wife of the said Joshua Spooner, not having GOD before her Eyes, but being seduced by the Instigation of the Devil, before the felony and murder aforesaid, by the aforesaid William Brooks, James Buchannon and Ezra Ross, in manner and form aforesaid done and committed, that is to say, on the twenty-eighth day of February last past, the aforesaid Bathsheba Spooner, at Brookfield aforesaid, in the County of Worcester aforesaid, the felony and Murder aforesaid, in manner and form aforesaid to be done and committed maliciously, wilfully, and of her malice aforethought did incite, move, abett, counsel and procure, against the peace of the Government and people aforesaid.

A true bill.

R. T. PAINE, Att'y pr. State.

SAMUEL DENNY, *foreman.*

WORCESTER SUPERIOR COURT,

April Term, 1778. The said William Brooks, James Buchannon, Ezra Ross and Bathsheba Spooner, are brought and sit to the Bar here, by the Sheriff of Worcester County, and arraigned; and upon their arraignment they severally plead, That thereof they are not guilty, and thereof they put themselves, for trial, on God and the Country.

Att., H. SMITH, *Clerk.*

DEATH WARRANT.

STATE OF MASSACHUSETTS BAY. } THE GOVERNMENT AND PEOPLE OF THE STATE OF MASSACHUSETTS BAY.

Seal.

To the Sheriff of our County of Worcester, Greeting:

Whereas, William Brooks, resident at Charlestown, in the County of Middlesex, labourer, James Buchannon, of the same Charlestown, labourer, and Ezra Ross, of Ipswich, in the County of Essex, labourer, now Prisoners in our Gaol in said Worcester, were, by the Jurors for us for the Body of our said County, at the Superior Court of Judicature, Court of Assize and General Gaol delivery, held at Worcester aforesaid, for the said County of Worcester, on the Tuesday next preceding the last Tuesday of April, indicted for that, the said William Brooks, resident at Charlestown, in the County of Middlesex, Labourer, James Buchannon, of the same Charlestown, Labourer, and Ezra Ross, of Ipswich, in the County of Essex, Labourer, not having GOD before their Eyes, but being moved and seduced by the Instigation of the Devil, on the first day of March last past, with force and arms, at Brookfield, in the County of Worcester aforesaid, feloniously, Wilfully, and of their Malice aforethought, in and upon Joshua Spooner, of said Brookfield, then and there in the Peace of GOD, and of the said Government and People being, an Assault did make, and that the aforesaid William Brooks, with his right Fist, the said Joshua Spooner to and against the Ground, then and there feloniously, Wilfully, and of his malice aforethought, did strike down, and the same Joshua Spooner so on the Ground lying, he, the said William Brooks, with both his Hands and feet of him, the said William Brooks, in and upon the back, Head, Stomach, Sides, and Throat of him, the

Jer. Powell,
Artemas Ward,
Jedidiah Preble,
T. Cushing,
John Whetcomb,
S. Holten,
B. White,
Benj. Austin,
H. Gardner,
Moses Gill,
D. Hopkins,
N. Cushing,
A. Fuller,
Josiah Stone,
Oliver Prescott.

said Joshua Spooner, then and there feloniously, wilfully, and of his Malice aforethought, did strike, beat and kick, giving to him, the said Joshua Spooner, as well by the stricking down of him, the said Joshua Spooner, to the Ground as aforesaid, as also by the stricking, beating and kicking the said Joshua Spooner in and upon the back, Head, and Stomach, Sides, and Throat, of him, the said Joshua Spooner as aforesaid, with both the Hands and feet of him, the said William Brooks, in manner aforesaid, Several Mortal Bruizes, of which said Several mortal Bruizes the said Joshua Spooner, there instantly died; and that James Buchannon aforesaid, and Ezra Ross aforesaid, feloniously, and of their Malice aforethought, then and there were present. aiding, assisting, abetting, comforting and maintaining the aforesaid William Brooks to the felony and Murther aforesaid, in form aforesaid, to be done and Committed; and that the said William Brooks, James Buchannon and Ezra Ross, the aforesaid Joshua Spooner, at Brookfield aforesaid, in Manner and form aforesaid, feloniously, Wilfully, and of their Malice aforethought, killed and Murthered, against the Peace of the Government and People aforesaid, and the Law of this State in such case made and provided. And that Bathsheba Spooner, of Brookfield, in the County of Worcester, Widow, late Wife of the said Joshua Spooner, not having GOD before her Eyes, but being seduced by the Instigation of the Devil, before the Felony and Murther aforesaid, by the aforesaid William Brooks, James Buchannon and Ezra Ross, in manner and Form aforesaid done and committed, that is to say, on the Twenty-eighth day of February last Past, the aforesaid Bathsheba Spooner, at Brookfield aforesaid, in the County of Worcester aforesaid, the Felony and Murther aforesaid, in manner and form aforesaid, to be done and committed Maliciously, Wilfully, and of her Malice aforethought did incite, move, abett, counsel and procure, against the Peace of the Government and People aforesaid. To which the said William Brooks, James Buchannon, Ezra Ross and Bathsheba Spooner, pleaded *Not guilty*, and were by Verdict of our Jurors, for our said County of Worcester, Convict; and thereupon the said William Brooks, James Buchannon, Ezra Ross and Bathsheba Spooner were, by our Justices of our said Court, adjudged to Suffer the Pains of Death, as to Us appears by a copy of Record of said Court hereunto annexed, whereof Execution doth still remain to be done.

We Command you therefore that, on Thursday, the fourth day of June next, between the Hours of twelve and four of the Clock, in the afternoon, You Cause the said William Brooks, James Buchannon, Ezra Ross and Bathsheba Spooner, to be conveyed from our Gaol in Worcester aforesaid, where they now are in your Custody, to the Usual Place of Execution in our said County of Worcester, and there to be hanged by the Neck until their Bodies be dead, for which this Shall be your Sufficient Warrant;—fail not at your Peril, and make return of this Writ, with

your doing therein, into the Secretary's Office of said State, at Boston, on the tenth day of June next:

Witness the Major Part of our Council, at Boston, this Eighth day of May, In the Year of our Lord, One thousand Seven hundred and Seventy Eight.

By their Honors' Order,

JOHN AVERY, *D'y Sec'y.*

PETITION OF THE PRISONERS FOR A REPRIEVE.

To the honorable the Council for the state of Massachusetts Bay, in New England:

The humble petition of James Buchanan, William Brooks, Ezra Ross and Bathshua Spooner, most humbly sheweth that your poor petitioners, fearfull of their unpreparedness to appear before their Maker and judge after the perpetrating so horrid a crime, and they being informed by the sherife the time of their execution would be on the fourth day of June —

Your poor petitioners do therefore most earnestly pray your honors, that you would be pleased to grant them some longer time than the before mentioned, which, should your honors in your great goodness grant them, they hope, and through the divine assistance and blessing upon the means used, trust they shall improve it to the most valuable purposes, it being a matter which concerns their everlasting salvation.

They most humbly submit to your honors' linety and goodness, and as in duty bound they will ever pray, &c. &c. &c.

JAMES BUCHANAN,
his
WILLIAM ⋈ BROOKS,
mark.
EZRA ROSS,
BATHSHUA SPOONER.

Worcester Gaol, 20th May, 1778.

Mr. Maccarty's most dutiful respects wait upon the honorable board, begging leave humbly to represent to them, that he has had much opportunity to know the state of the above named prisoners; that he has found the men all along, and especially since their condemnation, to be much affected with their deplorable condition; freely acknowledging their heinous guilt, and the righteousness of the sentence pronounced against them. They appear to be very humble and penitent — to be much in earnest that they may make their peace with their Maker — much engaged in acts of devotion, and eager to embrace all opportunities, both public and private, for religious counsels and instruction. For which

reasons Mr. Maccarty presumes humbly to desire, that the prayer of their petition, as above, may be granted. And in that case he can assure your honors on his own behalf, and on the behalf of his brethren in the ministry, that all suitable endeavors will be used with them, in order, if it shall please God to succeed them, that they may be prepared for the solemn scene before them. And as to the unhappy woman, he would beg leave further to represent, that she declares, she is several months advanced in her pregnancy, for which reason she humbly desires, that her execution may be respited till she shall have brought forth.

Worcester, May 20, 1778.

The above application is made at my most earnest request.

BATHSHUA SPOONER.

REPRIEVE.

THE GOVERNMENT AND PEOPLE OF THE MASSACHUSETTS BAY IN NEW ENGLAND.

To the Sheriff of our County of Worcester, Greeting:

Seal.

Jer. Powell,
Artemas Ward,
Walter Spooner,
Jabez Fisher,
Moses Gill,
Benj. Austin,
Dan. Davis,
Timo. Danielson,
N. Cushing,
Oliver Prescott,
A. Fuller,
Josiah Stone,
John Pitts,

Whereas, William Brooks, resident at Charlestown, in the County of Middlesex, Labourer, James Buchannon, of the same Charlestown, Labourer, and Ezra Ross, of Ipswich, in the County of Essex, Labourer, and Bathsheba Spooner, of Brookfield, in the County of Worcester, Widow, now Prisoners in our Gaol in said Worcester, in our said County of Worcester, were, at our Superiour Court of Judicature, Court of Assize and General Gaol Delivery, held at Worcester, in and for our said County of Worcester, on the Tuesday next preceding the last Tuesday of April, convicted of Murder, and was thereupon adjudged to suffer the Pains of Death: and a Warrant issued out by the Major Part of the Council of our State aforesaid, requiring you to put the Sentence thereof in Execution the fourth day of June next: but it hath been represented to us, that the said William Brooks, James Buchannon, Ezra Ross and Bathsheba Spooner, are desirous of further Time being allowed them to prepare for Death, — We, of our special Grace and favour do hereby direct and Command you to suspend and delay the Execution of the Sentence of our said Court until Thursday, the Second Day of July next, at

Sam. Baker,
Oliver Wendell.

which Time you are to proceed to Execute the said Warrant in manner and form as therein is Directed.

Witness the Major Part of our Council, at Boston, this Twenty-eighth Day of May, in the Year of our Lord, 1778.

By their Honors' Order,

JOHN AVERY, *D'y Sec'y.*

WRIT DE VENTRE INSPICIENDO.

THE GOVERNMENT AND PEOPLE OF THE MASSACHUSETTS BAY IN NEW ENGLAND.

To the Sheriff of Worcester, Greeting:

Seal.

Jere. Powell,
Artemas Ward,
Walter Spooner,
Jabez Fisher,
Moses Gill,
Benj. Austin,
Dan'l Davis,
Oliver Prescott,
Timo. Danielson,
N. Cushing,
John Pitts,
Oliver Wendell,
Josiah Stone,
A. Fuller,
Sam'l Baker.

Whereas, Bathsheba Spooner, late wife of Joshua Spooner, of Brookfield, in said County of Worcester stands attainted in due form of law before our Superior Court of Judicature, &c., held at Worcester, within and for the County of Worcester, on the third Tuesday of April, being accessory before the fact to the murder of the said Joshua Spooner, for which she has received sentence of Death, and a warrant has issued in due form of law, to have the same sentence duly executed on the fourth day of June next; and whereas, it has been represented to us in Council, by the said Bathsheba Spooner, that she is quick with child: And we, being desirous of knowing the truth of the said Representation, do command you therefore, that, taking with you two men midwives, and twelve discreet and lawful matrons of your County, to be first duly sworn, you, in your proper person, come to the said Bathsheba Spooner, and cause her diligently to be searched by the said matrons, in the presence of the said men midwives, by the Breasts and Belly, and certify the truth whether she be quick with child or not, and if she be quick with child, how long she has so been, under your seal, and the seals of the said men midwives, into the Secrertary's office of Massachusetts Bay aforesaid, at or before the 25th day of June next, together with the names of the matrons by whom you shall cause the said search and inspection to be made; hereof fail not, and make true return of this writ, with your doings hereon.

Witness the Major part of the Council of Massa-

chusetts Bay in New England, at Boston, this twenty-eighth day of May, A. D. 1778.

By their Honors' Order,

JOHN AVERY, *D'y Sec'y.*

RETURN OF THE SHERIFF.

WORCESTER ss. In strict compliance with the within directions and warrant, I have summoned two men midwives and twelve lawful matrons, and caused the said matrons to be under oath, and, in my proper person, with the said men midwives and matrons, attended on the said Bathsheba Spooner; they have made the searches as required in the within writ. The verdict of the above matrons is, that the said Bathsheba Spooner is not quick with child.

Given under our hand and seals, this eleventh day of June, A. D. 1778.

WILLIAM GREENLEAF, Sheriff, (Seal.)
JOSIAH WILDER, Midwife, (Seal.)
ELIJAH DIX, Midwife, (Seal.)

A list of the Matrons —

ELIZABETH RICE,
MARY TODMAN,
HANNAH PERRY,
ZURBILCH STOWELL,
CHRISTIAN WALKER,
EZEBEL QUIGLEY,
MARGARET BROWN,
MARY BRIDGE,
LIDIA BALL,
HANNAH BROOKS,
MARY STERNES,
SARAH JONES.

[ENDORSED.]

Warrant for examining Bathsheba Spooner, respect'g her being quick with child, with the return of the Sheriff of the County of Worcester thereon; also, inclosing her petition not granted. (See page 49.)

June 23d, 1778.

OPINION OF MIDWIVES.

WORCESTER, June 27, 1778.

To the Honour^bl Board of Councillors
for the State of Massachusetts Bay:

May it please your honors, we, the subscribers, have examined the body of Mrs. Bathsheba Spooner (by her desire) to find whether she is quick with child or not; and, altho' it was our, and the Jury of Matrons opinion, on the examination of y^e 11th Instant, that she was not quick

with child at that time, yet, upon this further examination, we would inform your Honors, that we must give it as our opinion, that we have reason to think that she is now quick with child.

JOHN GREEN,
JOSIAH WILDER, } Midwives.
ELIJAH DIX,

HANNAH MOWER, } Woman Midwife.

WORCESTER, June 27, 1778.

To the Hon^bl Board of Councillors
for the State of Massachusetts Bay:

Whereas we, the subscribers, Matrons, on the examination of Mrs. Bathsheba Spooner, on y^e 11th instant, did give it as our opinion, on oath, that she was not quick with child at that time, have again this day, at her request, examined her present circumstances, and give it as our opinion, that she is not even now quick with child.

ELIZABETH RICE,
MOLLY TATTMAN.

FINAL RETURN OF THE SHERIFF.

WORCESTER ss. In Obediance to the within Directions, I Suspended the Execution of Wm. Brooks, James Buchannon, Ezra Ross and Bathsheba Spooner, from the forth June last, till July the second Day, which was on thursday last; then Carried the Abovesaid Wm. Brooks, James Buchannon, Ezra Ross, with Bathsheba Spooner, to the place of Execution, and there hanged them Each By the Neck untill they were Dead, between the houres of twelve and four of the Clock in the Afternoon, as Directed by a warrant to me from the Major Part of the Council, bearing Date the Eighth Day of May last, in the year of our Lord One thousand seven hundred and seventy-eight.

WILL^M GREENLEAF, *Sheriff.*

Lancaster, July 6th, AD. 1778.

MAJOR ANDRÉ.

The death of Major André was, in some respects, the most affecting event that occurred during the revolutionary war, and it is believed that the feelings of Washington were in nothing more severely tried. The lady to whom André was attached, and whose marriage with another drove him into the army (page 158) is stated, in a recent publication, to have been Honora Sneyd, who married Richard Lovel Edgworth, and thus became step-mother to the celebrated Maria Edgworth. The remarks of three writers upon the proceedings against this unfortunate officer are here inserted. The first is Sir Samuel Romilly, a lawyer of great eminence in his day; the second is Lieutenant Colonel Simcoe, a British officer who was in the army at the time André was taken, and whose Journal, recently published, exhibits a bitter spirit against the Americans; the third is James Fennimore Cooper, an American author of eminence.

REMARKS OF SIR SAMUEL ROMILLY.

The Congress, to justify their generals in the severity exercised over Major André, who, as he was returning from concerting measures with Arnold, was taken and hanged, have published a very long account of that affair, with all the letters that passed between the generals upon the occasion. Major André's case was laid before a board consisting of fourteen field officers, and it was their unanimous opinion that he ought to suffer death; but they gave no other reasons for their sentence, than that it was conformable to the rules of war. The arguments used by Clinton and Arnold in their letters to Washington, to prove that André could not be considered as a spy, are, first, that he had with him when he was taken, a protection of Arnold's, who was at that time acting under a commission of the Congress, and therefore competent to give protections. Certainly he was, to all strangers to his negotiation with Clinton, but not to André, who knew him to be at that time a traitor to the Congress; nay, more, whose protection was granted for no other purpose but to promote and give effect to his treachery. In the second place, they say that, at the time he was taken, he was upon neutral ground; but then they do not deny that he had been within the American lines in disguise. The letters written by André himself, show a firm, cool intrepidity, worthy a more glorious end. Writing to General Clinton, he requests that his mother and sister may have the sale of his commission; as for himself, he says, he is "perfectly tranquil in mind, and prepared for any fate to which an honest zeal for the king's service may have devoted" him. There is another short note which he wrote to Washington the day before his execution; it concludes with these words: "Let me hope, sir, if aught in my character impresses you with esteem towards me, if aught

in my misfortunes marks me as the victim of policy and not of resentment, I shall experience the operation of these feelings in your breast by being informed that I am not to die *on a gibbet.*" "But," say the Congress, "the practice and usage of war were against his request, and made the indulgence he solicited inadmissible." The fate of this unfortunate young man, and the manly style of his letters, have raised more compassion here than the loss of thousands in battle, and have excited a warmer indignation against the Americans than any former act of the Congress. When the passions of men are so deeply affected, you will not expect them to keep within the bounds of reason. Panegyrics on the gallant André are unbounded; they call him the English Mutius, and talk of erecting monuments to his memory; but his situation was by no means such as to admit of these exaggerated praises.—*Letter to Rev. John Roget, December* 12, 1780. *Romilly's Memoirs*, i. 140.

REMARKS OF LIEUTENANT COLONEL SIMCOE.

There were no offers whatsoever made by Sir Henry Clinton; amongst some letters which passed on this unfortunate event, a paper was slid in without signature, but in the handwriting of Hamilton, Washington's secretary, saying, "that the only way to save André was to give up Arnold." Major André was murdered upon private not public considerations. It bore not with it the stamp of justice; for there was not an officer in the British army whose duty it would not have been, had any of the American generals offered to quit the service of Congress, to have negotiated to receive them; so that this execution could not, by example, have prevented the repetition of the same offence. It may appear, that, from his change of dress, &c., he came under the description of a spy; but when it shall be considered "against his stipulation, intention and knowledge," he became absolutely a prisoner, and was forced to change his dress for self-preservation, it may safely be asserted, that no European general would, on this pretext, have had his blood upon his head. He fell a sacrifice to that which was expedient, not to that which was just; what was supposed to be useful superseded what would have been generous; and though, by imprudently carrying papers about him, he gave a color to those, who endeavored to separate Great Britain from America to press for his death, yet an open and elevated mind would have found greater satisfaction in the obligations it might have laid on the army of his opponents, than in carrying into execution a useless and unnecessary vengeance. It has been said, that not only the French party from their customary policy, but Mr. Washington's personal enemies urged him on, contrary to his inclinations, to render him unpopular if he executed Major André, or suspected if he pardoned him. The papers which Congress published, relative to Major André's death, will remain

an eternal monument to the principles of that heroic officer; and, when fortune shall no longer gloss over her fading panegyric, will enable posterity to pass judgment on the character of Washington.—*Simcoe's Journal, Appendix*, 292.

REMARKS OF MR. J. F. COOPER.

The fate of André became an object of the keenest solicitude to both armies. From the commencement of the struggle to the last hour of its continuance, the American authorities had acted with a moderation and dignity that gave it a character far more noble than that of a rebellion. In no one instance had the war been permitted, on their part, to assume the appearance of a struggle for personal aggrandizement. It was men battling for the known rights of human nature. But a crisis had arrived when it was to be seen whether they would dare to expose the defenceless of their land, to the threatened retaliation of a powerful foe. Such is the wayward feeling of man, that it is far less offensive to his power to kill a general in open conflict, than to lead a subordinate deliberately to an execution, which is sanctioned only by a disputed authority. In the present instance, however, the offender was not only an officer of a high and responsible situation, but he was one who had made himself dear to the army by his amiable qualities, and eminently useful to its commander by his attainments. I think, among men of high and honorable minds, there can be but one opinion concerning the merit of his enterprise. There is something so repugnant to every loyal sentiment in treason, that he who is content to connect himself, ever so remotely, with its baseness, cannot expect to escape altogether from its odium. It is true that public opinion has, of necessity, fixed bounds which military men may approach, without committing their characters for manliness and honor. Without this privilege, it is plain that a general could not arrive at the knowledge which is requisite to enable him to protect his command against attempts, that admit of no other control than the law of the strongest. But it is also true, that the same sentiment has said it is dangerous to reputation to pass these very limits. Thus, while an officer may communicate with, and employ a spy, he can scarcely with impunity, become a spy himself. There is no doubt that the motive and the circumstances may so far qualify, even more equivocal acts, as to change their moral nature. Thus, Alfred, seeking to vindicate the unquestionable rights of his country, was no less invested with the moral majesty of a king, while wandering through the Danish camp, than when seated on his throne; but it may be permitted to doubt whether the young military aspirant, who sees only his personal preferment in the distance, has a claim to be judged with the same lenity.

Major André was the servantof a powerful and liberal government that

was known never to reward niggardly, and the war in which he served, was waged to aggrandize its power, and not to assert any of the natural rights of man. With doubtful incentives, and for the attainment of such an object, did this accomplished young soldier condescend to prostitute his high acquirements, and to tamper with treason. He did more. He overstepped the coy and reserved distance which conscious dignity preserves, even while it stoops to necessity, and entered familiarly and personally into the details of the disgusting bargain. The mere technicalities of posts and sentinels, though they may be important for the establishment of rules which are to soften the horrors of war, can have but little influence on the moral views of his conduct. The higher the attainments of the individual, the greater must have been the flexibility which could see only reward in an undertaking like this. As to the commonplace sentiment of serving king and country, every man of an honest nature must feel that he would have done more honor to his sovereign and himself by proving to the world, that the high trust he enjoyed was discharged by a man who disdained lending his talents to the miserable work of deception, than by degrading his office, his character, and his name, by blending them all, in such familiar union, with treachery. In short, while it cannot be denied that the office of a spy may be made doubly honorable by its motives, since he who discharges the dangerous duty may have to conquer a deep moral reluctance to its service, no less than the fear of death, I think it must be admitted that the case of Major André was one that can plead no such extraordinary exemption from the common and creditable feeling of mankind.

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There is reason to think that André had soothed himself in the earlier part of his captivity, with hopes that were fated to be deceived. It had been the misfortune of the English to undervalue the Americans, and it is quite in nature for a young man, who, it is well known, had often indulged in bitter sarcasms against enemies he despised, to believe that a nation he held so cheap, must have some of his own awe of a government and a power he thought invincible. It is certain he always spoke of Sir Henry Clinton (the English commander-in-chief,) with the affection and confidence of a child, until he received his last letter, which he read in much agitation, thrust into his pocket, and never afterwards mentioned his general's name. He confessed his ancient prejudices, but admitted they were all removed by the tender treatment he had received. He neither acknowledged nor denied the justice of his sentence. It is known that, though he experienced a momentary shock at finding that he was to suffer on the gallows, he met his death heroically, and died amid the tears of all present.—*Notions of the Americans: picked up by a Travelling Bachelor*, i. 217.